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Supreme Court, U.S.
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No. 03-418

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In The

Supreme Court of the United States

GABRIEL J. MARTINEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether 10 U.S.C. § 1552 is a money-mandating statute upon which a plaintiff may base a Tucker Act claim.

If so, whether appellant's Tucker Act claim seeking judicial review of the decision of the Army Board for Correction of Military Records was timely filed within the Statute of Limitations provided in 28 U.S.C. § 2501.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Gabriel J. Martinez, respectfully prays that a writ of *certiorari* issue to review the judgment and *en banc* decision of the United States Court of Appeals for the Federal Circuit rendered in this proceeding on June 17, 2003. As set forth herein, petitioner respectfully asserts that both questions must be answered in the affirmative entitling petitioner to judicial relief.

OPINION BELOW

The opinion of the United States Court of Appeals for the Federal Circuit, *United States v. Martinez*, 333 F.3d 1295 (Fed. Cir. 2003), is reprinted as Appendix A.

The opinion of the United States Court of Federal Claims, *Martinez v. United States*, No. 98-662C (Fed. Cl. August 9, 1999) is reprinted as Appendix B.

JURISDICTION

The United States Court of Appeals for the Federal Circuit, *en banc*, affirmed the August 9, 1999 decision of the United States Court of Federal Claims on June 17, 2003. Appendix A. This Court possesses discretionary jurisdiction of this case pursuant to 28 U.S.C. § 1259(3), which entitles petitioner to seek review of the United States Court of Appeals for the Federal Circuit's decision below. Pursuant to Rule 29.4 a copy of this Petition has been served on the Solicitor General of the United States.

STATUTES AND REGULATIONS

The verbatim text of all pertinent Statutes and Regulations are reprinted at Appendix C.

STATEMENT OF THE CASE

Petitioner was involuntarily separated from the active duty component of the United States Army on February 25, 1992, although he continued to serve in the Reserve component of the U.S. Army. In March 1995, petitioner sought review of the discharge, correction of his Army record from the U.S. Army Board for Correction of Military Records ("the Board" or "ABCMR"), and reinstatement to active duty. On August 23, 1995, the ABCMR denied petitioner's Application for Correction of Military Record. Petitioner requested reconsideration of the Board's decision, which was denied on March 26, 1997. Petitioner was discharged from the Army Reserve on March 25, 1997 upon his failure of selection to the grade of Major.

On August 17, 1998, petitioner filed a complaint in the United States Court of Federal Claims alleging that the ABCMR decision denying petitioner relief was arbitrary and capricious, constituted an abuse of discretion, was not supported by substantial evidence, and failed to comply with the Board's statutory mandate. The Court of Federal Claims, relying upon *Hurick v. Lehman*, 782 F.2d 984 (Fed. Cir. 1986), dismissed the complaint as time-barred by the 28 U.S.C. § 2501 statute of limitations because petitioner's complaint was filed more than six years after his

discharge from Army active duty in 1992. Petitioner timely appealed the dismissal of the Complaint to the United States Court of Appeals for the Federal Circuit.

Following oral argument by a panel of the United States Court of Appeals for the Federal Circuit, the Court ordered the parties to file new briefs inviting the parties to address the question whether *Hurick v. Lehman* should be overruled. On July 9, 2002, the Court of Appeals for the Federal Circuit heard oral arguments *en banc*. On June 17, 2003, the United States Court of Appeals for the Federal Circuit docketed its 7-6 *en banc* decision affirming the dismissal of petitioner's complaint in the United States Court of Federal Claims on grounds that the statute of limitations had run on petitioner's claim.

ARGUMENT AND REASON FOR GRANTING THE WRIT

In 1951, Congress provided military members with an administrative mechanism through which military members might seek correction of errors and injustices in their military records. Pub. L. No. 82-220, 65 Stat. 655 (1951). The statute required that the Military Departments create administrative boards to review claims of error and injustice by service members and authorized the Military Departments to make payments to military claimants which such payments were found to be due as a result of correction board action. *Id; see also* 10 U.S.C. §1552(c). The question presented in this action is whether a military member who avails himself of the lawful mechanism enacted by Congress is entitled to judicial review of the

decision of the administrative agency denying relief in a timely-filed Tucker Act claim filed in the Court of Federal Claims. With due respect to the majority opinion below, petitioner respectfully asserts that dismissal of his complaint was legal error premised upon an erroneous interpretation of the Tucker Act statute of limitation.

The Military Correction Board Statute and Implementing Regulations are Money-Mandating Provisions of Law

The Tucker Act provides subject matter jurisdiction for money claims "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department." 28 U.S.C. § 1491(a)(1). Thus, a Tucker Act plaintiff states a claim whenever he asserts a substantive right to money due and owing from the United States based upon a provision of law or regulation. *United States v. Testan*, 424 U.S. 392, 400 (1976) (the entitlement to money damages depends upon whether a federal statute or regulation "can fairly be interpreted as mandating compensation" by the United States for damage sustained); *Palmer v. United States*, 168 Fed.3d 1310, 1312-13 (Fed. Cir. 1999) (explaining requirement of a money-mandating statute upon which to found a Tucker Act claim).

The military record correction statute provided petitioner with the requisite money-mandating provision upon which to found his Tucker Act claim in this case. That statute provides, in relevant part, that the Secretary of a Military Department:

> may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if as a result of correcting a record under this section, the amount is found to due the claimant.

10 U.S.C. §1552(c).

Importantly, the regulations issued by the Army affirmatively provide for payment of money incident to correction board decisions. Under the regulations, the Director, Defense Finance and Accounting Service (DFAS) is responsible for settlement of money claims arising from the decisions of the ABCMR. Specifically, 32 C.F.R. § 581.3(h) provides that "[t]he ABCMR will furnish DFAS with copies of decisions potentially affecting monetary entitlement or benefits. The DFAS will treat such decisions as claims for payment by or on behalf of the applicant." 32 C.F.R. § 581.3(h)(2)(i). The subsection further provides that "DFAS will settle claims on the basis of the corrected military record." *Id.* § 581.3(h)(2)(ii).

Accordingly, there is no doubt but that once a favorable decision is rendered by the ABCMR, statute and regulations create an enforceable obligation against the United States and no further action by the claimant to perfect his claim is required. These statutes and regulations, read together, provide the money-mandating provision of law supporting a Tucker Act claim. *See, e.g., Blum v. United States*, 227 Ct. Cl. 555,

559 n.3 (1981) (section 1552 "is a statute expressly mandating compensation, and we can enforce it if the plaintiff should have been retired for disability but the Correction Board illegally failed to so find."). Accordingly, where a claimant, as did petitioner, asserts in his well-pleaded complaint a claim that the correction board acted arbitrarily and capriciously and contrary to law denying petitioner a monetary remedy otherwise due, petitioner has stated a cognizable cause of action under the Tucker Act and the courts below erred in dismissing the Complaint.

The Federal Circuit Stands Alone in Holding that Challenge to a Correction Board Decision is a Separate Cause of Action

Each of the other United States Courts of Appeals that have considered the issue has concluded that an action seeking judicial review of the decision of a military service record correction board is a cause of action separate and distinct from the underlying military decision sought to be corrected. *See, e.g., Blassingame v. Secretary of the Navy*, 811 F.2d 65, 68 (2d Cir. 1987); *Dougherty v. United States Navy Bd. For Correction of Naval Records*, 784 F.2d 499 (3d Cir. 1986); *Geyen v. Marsh*, 775 F.2d 1303, 1308-09 (5th Cir. 1985); *Smith v. Marsh*, 787 F.2d 510 (10th Cir. 1986). The United States Court of Appeals for the Federal Circuit stands alone in its holding that the military records correction board decisions are not separate causes of action subject to judicial review independent of the underlying military decisions. *Hurick v. Lehman*, 782 F.2d 984 (Fed. Cir. 1986).

The Federal Circuit's *Hurick* decision, while contrary to the weight of authority arising in other Circuits, also runs afoul of other important jurisprudential considerations. First, this Court's decision in *Harmon v. Brucker*, 355 U.S. 579 (1958), holds that the availability of judicial review of a final agency decision, such as a military correction board decision, is presumed unless there is clear and convincing evidence that Congress intended to foreclose such review. *Dunlop v. Backowski*, 421 U.S. 560, 567 (1975); *Harmon*, 355 U.S. at 581-82; *Blassingame*, 811 F.2d at 71. No such Congressional intent is discernable from the text of the Tucker Act statute of limitation. Indeed, the *Hurick* decision simply represents the Federal Circuit's judge-made effort to draw a "bright line" from which to start the running of the statute of limitations. There is no reason that a similar "bright line" should not also be drawn on a cause of action for Tucker Act judicial review starting from the date the military correction board provides an Applicant with a decision subject to review.

Second, operation of the Federal Circuit's *Hurick* rule undermines the importance and utility of exhaustion of administrative remedies in the administrative agency context and tends to discourage resort to available administrative remedies. This Court long has noted the prudential and practical reasons for requiring exhaustion of available administrative remedies, including development of a factual record, application of specialized agency knowledge and expertise and administrative correction of the agency's own errors without judicial intervention. *See McKart v. United States*, 395 U.S. 185, 193-94 (1969). The Federal

Circuit judge-made rule that forecloses judicial Tucker Act judicial review of an agency decision reached more than six years after discharge does not provide for judicial review in every case of a military record correction board decision and diminishes the role of the agency in reviewing and possibly correcting military decisions, which are by their nature decisions requiring military expertise not shared by the Federal Courts.

Further, the rule propounded by the Federal Circuit in *Hurick* forecloses judicial review to an entire class of former military member who first uses the available agency administrative remedy prior to instituting litigation. A military member who receives an unfavorable military record correction board decision more than six years after discharge and whose claim would be within the exclusive jurisdiction of the Tucker Act is foreclosed, under *Hurick*, from obtaining judicial review of that decision simply because the discharge underlying the service record correction board decision pre-dates the decision by six years. *Blassingame*, 811 F.2d at 71-72. A veteran whose claim is subject to Tucker Act review, therefore, under the rule of *Hurick*, is foreclosed from seeking judicial review, whereas veteran's who eschew a money remedy in District Court will find the doors to the court open and the court available to provide judicial review of the claim.

This Court should grant the Writ of *Certiorari* in order to resolve the split of authority between the Federal Circuit and all of the other Circuit Courts of Appeals regarding whether an action seeking judicial

review of a final decision of a military service record correction board is a separate cause of action from the underlying military decision reviewed by the military correction board and for which the statute of limitations begins to run upon the date of the decision of the military service record correction board under review by the court.

CONCLUSION

Petitioner asks this Court to grant *Certiorari* to resolve whether a Tucker Act cause of action for judicial review of the decision of a military records correction board is a cause of action distinct from direct judicial review of the underlying military decision and whether the statute of limitations on such action for judicial review runs from the date of the service record correction board decision or from the date on which the military officer was discharged from the military.

Respectfully submitted,

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September 15, 2003

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United States Court of Appeals
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entered June 17, 2003

Appendix B:

Opinion of
The Honorable James F. Merow
Re: Granting Defendant's Motion to Dismiss,
Denying As Moot Defendants Alternative Motion
and Denying Plaintiff's Motion for Summary Judgment
entered August 9, 1999

Appendix C:

10 U.S.C. § 1552

28 U.S.C. § 2501

32 C.F.R. § 581.3

United States Court of Appeals for the Federal Circuit

99-5163

GABRIEL J. MARTINEZ,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Charles W. Gittins, Law Offices of Charles W. Gittins, P.C, of Middletown, Virginia, argued for plaintiff-appellant.

James M. Kinsella, Deputy Director, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellee. On the brief was David M. Cohen, Director. Of counsel on the brief were Tara A. Osborn, LTC, and James R. Agar II, Major, Army Litigation Division, United States Army, of Arlington, Virginia. Of counsel were Aileen M. Bell, Joseph Trautwein, and Opher Shweiki, Attorneys, Department of Justice, of Washington, DC. Also of counsel was Captain David E. Mendelson, Army Litigation Division, United States Army, of Arlington, Virginia.

Appealed from: United States Court of Federal Claims
Senior Judge James F. Merow

United States Court of Appeals for the Federal Circuit

99-5163

GABRIEL J. MARTINEZ,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

DECIDED: June 17, 2003
[ENTERED: June 17, 2003]

Before MAYER, Chief Judge, NEWMAN, MICHEL, Circuit Judges, PLAGER, Senior Circuit Judge, LOURIE, CLEVENGER, RADER, SCHALL, BRYSON, GAJARSA, LINN, DYK, and PROST, Circuit Judges.

Opinion for the court filed by Circuit Judge BRYSON, in which Circuit Judges MICHEL, LOURIE, CLEVENGER, RADER, SCHALL, and PROST join; and in which Circuit Judges NEWMAN, LINN, and DYK join with respect to PARTS I, II, III, V, and VI.

Dissenting opinion filed by Senior Circuit Judge PLAGER, in which Chief Judge MAYER and Circuit Judges NEWMAN, GAJARSA, LINN, and DYK join.

BRYSON, Circuit Judge.

We took this case en banc to address the question whether to overrule our decision in Hurick v. Lehman, 782 F.2d 984 (Fed. Cir. 1986), regarding the calculation of the limitations period for military discharge cases brought in the Court of Federal Claims. After careful consideration, we conclude that Hurick should not be overruled, and we affirm the judgment of the Court of Federal Claims.

I

Gabriel J. Martinez was commissioned as an officer in the United States Army Reserve in October 1980. In 1984 he joined the Active Guard Reserve Program and continued on active duty with that program until 1992, attaining the rank of captain.

In 1991, while Captain Martinez was still on active duty, a proceeding was brought against him under Article 15 of the Uniform Code of Military Justice, 10 U.S.C. § 815, on charges of fraternization, adultery, communicating a threat, and impeding a witness. An Article 15 proceeding is an informal proceeding in which only limited penalties may be imposed upon a finding of guilt. It takes place before a command officer, unlike a court-martial, which is held before a military court.

The charges stemmed from an allegation that Captain Martinez had had an affair with a female sergeant between April and July 1991. The person making the allegation, the sergeant's husband, stated that Captain Martinez had threatened to kill him if he

reported the affair to military authorities. Captain Martinez denied the charges and asserted that the husband had fabricated the story about the affair and the threat in order to help Captain Martinez's ex-wife in a custody fight.

On August 9, 1991, at the conclusion of the Article 15 proceeding, Captain Martinez was found guilty of the charges against him and was ordered to forfeit two months' pay. Captain Martinez appealed from the Article 15 determination, but the appeal was denied. On February 25, 1992, based on the outcome of the Article 15 proceeding, Captain Martinez was separated from active duty and transferred to the Army Reserve Control Group. Although his "character of service" was listed as "honorable," the reason for his separation was identified as "misconduct."

In 1994, an Officer Elimination Board convened to consider whether Captain Martinez should be discharged from the United States Army Reserve. The Board considered evidence from Captain Martinez and other witnesses. The evidence included a sworn statement from Captain Martinez's ex-wife, in which she stated that the sergeant's husband had sought to have Captain Martinez disciplined by the Army in order to assist her in her custody battle with Captain Martinez. She also stated that the sergeant's husband had admitted to her that his allegations about the affair between his wife and Captain Martinez were false. After hearing that evidence, the Officer Elimination Board concluded that the charges against Captain Martinez that formed the basis for the Article 15 proceeding were not true. The Board therefore recommended that he be retained as a reserve officer.

The Article 15 proceeding remained a part of his military record, however, and later that year he was notified that he was not selected for promotion to major.

In March 1995, Captain Martinez filed an application with the Army Board for Correction of Military Records ("the Correction Board") asking that the Article 15 proceeding be expunged from his military record, that his discharge from active duty be voided, that he be restored to active duty without a break in service, that he be promoted retroactively to major, and that he be awarded the pay he would have received during the period after his discharge. He also requested Correction Board review of an earlier disciplinary letter in his file unrelated to the subject of the Article 15 proceedings.

On August 23, 1995, the Correction Board denied Captain Martinez's application. The Correction Board declined to give any weight to the Officer Elimination Board's conclusion that Captain Martinez had not committed the alleged misconduct that was the subject of the Article 15 proceeding. The Correction Board concluded instead that it was likely that Captain Martinez had committed the acts that were the subject of the Article 15 proceeding and that Mrs. Martinez's sworn statement to the contrary was "unconvincing," because "she probably has a vested interest in the continuation of [Captain Martinez's] career."

Captain Martinez sought reconsideration of the Correction Board's decision, but the Correction Board denied that request on March 26, 1997. In the meantime, Captain Martinez was passed over a second

time for promotion to major and accordingly was separated from the United States Army Reserve on March 25, 1997.

On August 17, 1998, Captain (now Mr.) Martinez filed a complaint in the Court of Federal Claims alleging that the Correction Board's decision was arbitrary and capricious, constituted an abuse of discretion, was not supported by substantial evidence, and failed to comply with the Correction Board's statutory mandate. By way of relief, the complaint asked the court for an order correcting his letter of reprimand and his Article 15 punishment from his military record and removing any reference to "misconduct" as the reason for his separation from active duty; reinstating him to active duty in the United States Army Reserve with the rank of captain; directing the Army to place his corrected military record before a special selection board to consider him for promotion to the rank of major without taking into account the Article 15 information in his record; requiring the Army to return the two months' pay he forfeited in the Article 15 proceeding; and awarding him back pay from the date of his separation from active duty in February 1992.

The Court of Federal Claims dismissed the complaint as time-barred. Martinez v. United States, No. 98-662C (Fed. Cl. Aug. 9, 1999). Because Mr. Martinez had filed his complaint more than six years after February 25, 1992, the date of his separation from active duty, the court held that it did not have jurisdiction over his case in light of the six-year statute of limitations for claims against the government brought in the Court of Federal Claims. See 28 U.S.C. §

2501. The court explained that "[a] claim based on unlawful discharge or release from military service accrues on the date of discharge or release because that is the date the injury—i.e., the loss of pay—is incurred." Martinez, slip op. at 8. Thus, the court ruled that Mr. Martinez's claim for reinstatement to active duty, back pay, and other ancillary relief accrued on February 25, 1992. The claim for forfeited pay accrued on August 9, 1991, the court ruled, because that was the date on which the pay was forfeited as a result of the Article 15 proceeding, and thus was the date on which the injury incurred. Id.

The court rejected what it referred to as Mr. Martinez's "attempt to avoid the statute of limitations by characterizing this action as a challenge to the [Correction Board's] decisions rather than the propriety of the disciplinary actions taken against him or his release from active duty." Martinez, slip op. at 9. Citing this court's decision in Hurick v. Lehman, 782 F.2d 984 (Fed. Cir. 1986), the court explained that the failure of a civilian correction board to set aside a military discharge does not give rise to a separate and independent claim, because the correction board's action is "merely ancillary to the discharge that the former serviceman is seeking to change." Martinez, slip op. at 9 (quoting Hurick, 782 F.2d at 987). The court noted that resort to a correction board is not a mandatory prerequisite to challenging the discharge in the Court of Federal Claims, and that the statute of limitations "is not tolled by resort to optional administrative remedies, such as an appeal to a military records correction board." Id.

Finally, the trial court rejected Mr. Martinez's argument that the statute of limitations should be tolled until November 4, 1993, when Mrs. Martinez issued her sworn statement that gave rise to his claim that his Article 15 punishment was improper. The court explained that the statute of limitations for an action in the Court of Federal Claims is tolled only if the plaintiff shows that the defendant has concealed the facts giving rise to the cause of action, preventing the plaintiff from learning of those facts, or if the injury was inherently unknowable as of the accrual date. In this case, the court held, there was no evidence that the government had been guilty of any concealment, and the injury in question was plain to Mr. Martinez as of February 25, 1992, when he was released from active duty. Martinez, slip op. at 10.

Mr. Martinez appealed the dismissal order to this court. Before the panel, Mr. Martinez acknowledged that the principal issues in the case were controlled by this court's decision in Hurick v. Lehman, and that if the panel followed Hurick it would have to conclude that his cause of action accrued as of the date of his discharge from active duty and that the running of the limitations period was not tolled by his application to the Correction Board. Mr. Martinez therefore urged the court to reconsider Hurick. After oral argument before the panel, the full court granted en banc review, ordered the parties to file new briefs, and invited the parties to address the question whether Hurick should be overruled. We now reaffirm Hurick v. Lehman, and we affirm the order of the trial court dismissing the complaint as time-barred.

II

As the parties acknowledge, the facts of the Hurick case closely parallel the facts of this case in all material respects. Mr. Hurick was discharged from the Navy for unsuitability. He twice sought relief from the Board for the Correction of Naval Records, challenging his discharge as unlawful. The Board denied relief. Following the Correction Board's second ruling, and seven years after his discharge, Mr. Hurick filed an action in district court based in part on the "Little Tucker Act," 28 U.S.C. § 1346(a)(2). The district court held that the six-year statute of limitations for suits against the United States barred the action, and this court affirmed.

Like Mr. Martinez, Mr. Hurick sought both reinstatement and an award of the pay he lost as a result of his discharge. Based on a long line of decisions from this court and its predecessor, the Court of Claims, this court held that Mr. Hurick's claim accrued as of the date of his discharge. Hurick, 782 F.2d at 986. Accordingly, the statute of limitations ran from that date and expired six years later. The court rejected Mr. Hurick's argument that the statute of limitations was tolled for the period in which his applications for relief were pending before the Board for the Correction of Naval Records ("BCNR"). The court explained that resort to the BCNR was a permissive remedy, not a mandatory precondition to filing suit. Accordingly, the court held that the proceedings before the BCNR did not suspend the running of the limitations period. Id. at 987. With respect to Mr. Hurick's argument that he was not challenging his original discharge, but was challenging

only the refusal of the BCNR to give him relief from the discharge, the court held that the failure of the BCNR to set aside a military discharge "does not give rise to a separate and independent claim, since that action is merely ancillary to the discharge that the former serviceman is seeking to change." Id.

III

Mr. Martinez acknowledges that his action under the Tucker Act, 28 U.S.C. § 1491, was subject to the six-year statute of limitations set forth in 28 U.S.C. § 2501.[1] He also acknowledges, as he must, that his complaint in the Court of Federal Claims was not filed within six years of his discharge from active duty. He makes three arguments as to why the six-year limitations period does not bar his action. First, he contends that a service member challenging a discharge from active duty is required to exhaust all available administrative remedies in a correction board before filing a Tucker Act claim. For that reason, he argues, the six-year statute of limitations did not begin to run until the date of the Correction Board's decision in his case. Second, he contends that a second cause of action accrued at the time of the Correction Board decision and that the statute of limitations on that

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[1] Section 2501 provides, in pertinent part: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." The general statute of limitations for suits against the United States, 28 U.S.C. § 2401, has almost identical language: "Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

cause of action began to run at that time. Third, he argues that, even if his sole cause of action accrued when he was separated from active duty, the running of the statute of limitations was equitably tolled until his ex-wife made the written statement supporting his contention that the charges against him were fabricated. We address the first argument in this Part of our opinion and the other two arguments in Parts IV and V.

A

The Tucker Act authorizes certain actions for monetary relief against the United States to be brought in the Court of Federal Claims. The actions for which the Tucker Act waives sovereign immunity are actions pursuant to contracts with the United States, actions to recover illegal exactions of money by the United States, and actions brought pursuant to money-mandating constitutional provisions, statutes, regulations, or executive orders. See United States v. Navajo Nation, 123 S. Ct. 1079, 1089 (2003); United States v. Mitchell, 463 U.S. 206, 212-18 (1983); United States v. Testan, 424 U.S. 392, 400 (1976); Moyer v. United States, 190 F.3d 1314, 1318 (Fed. Cir. 1999); Tippett v. United States, 185 F.3d 1250, 1254-55 (Fed. Cir. 1999). The Tucker Act does not itself provide the substantive cause of action; instead, a plaintiff must look elsewhere for the source of substantive law on which to base a Tucker Act suit against the United States. Testan, 424 U.S. at 398; Collins v. United States, 67 F.3d 284, 286 (Fed. Cir. 1995). In the context of military discharge cases, the applicable "money-mandating" statute that is generally invoked is the Military Pay Act, 37 U.S.C. § 204. In order to bring a military discharge case in the Court of

Federal Claims, a plaintiff therefore must allege that, because of the unlawful discharge, the plaintiff is entitled to money in the form of the pay that the plaintiff would have received but for the unlawful discharge.

Although the Court of Federal Claims does not have general equity jurisdiction, the Tucker Act provides that in cases based on actions for monetary relief, the court may issue such orders as are necessary "[t]o provide an entire remedy and to complete the relief afforded by the judgment," including "as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records." 28 U.S.C. § 1491(a)(2).

B

A cause of action cognizable in a Tucker Act suit accrues as soon as all events have occurred that are necessary to enable the plaintiff to bring suit, i.e., when "all events have occurred to fix the Government's alleged liability, entitling the claimant to demand payment and sue here for his money." Nager Elec. Co. v. United States, 368 F.2d 847, 851 (Ct. Cl. 1966); see Catawba Indian Tribe of S.C. v. United States, 982 F.2d 1564, 1570 (Fed. Cir. 1993); Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1577 (Fed. Cir. 1988). In a military discharge case, this court and the Court of Claims have long held that the plaintiff's cause of action for back pay accrues at the time of the plaintiff's discharge. See Bowen v. United States, 292 F.3d 1383, 1386 (Fed. Cir. 2002); Real v. United States,

906 F.2d 1557, 1560 (Fed. Cir. 1990); Williams v. Sec'y of the Navy, 787 F.2d 552, 562 n.15 (Fed. Cir. 1986); Bray v. United States, 785 F.2d 989, 994 (Fed. Cir. 1986); Bonen v. United States, 666 F.2d 536, 539 (Ct. Cl. 1981).[2] The service member therefore has the right to sue immediately upon discharge for the funds improperly being withheld. Moreover, the courts have made clear that a Tucker Act claim for back pay accrues all at once at the time of discharge; the claim for back pay is not a "continuing claim" that accrues each time a payment would be due throughout the period that the service member would have remained on active duty. See Longhine v. United States, 230 Ct. Cl. 920, 922 (1982); Vincin v. United States, 468 F.2d 930, 933 (Ct. Cl. 1972); Mathis v. United States, 391 F.2d 938, 939 (Ct. Cl. 1968). If the plaintiff does not file suit within the six-year limitation period prescribed in 28 U.S.C. § 2501, the plaintiff loses all rights to sue for the loss of pay stemming from the challenged discharge. That is, the claim accrues "at one time, once and for all," on the date of discharge, even though the asserted obligation to pay the plaintiff, on which the claim is based, continues until the end of the plaintiff's enlistment. Mathis, 391 F.2d at 939.

This court and the Court of Claims have frequently addressed and rejected the argument that the cause of action for unlawful discharge does not accrue until the service member seeks relief from a

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[2] Other courts have also held that a cause of action for unlawful discharge accrues at the time of discharge. See Geyen v. Marsh, 775 F.2d 1303, 1308 (5th Cir. 1985); Walters v. Sec'y of Defense, 725 F.2d 107, 114 (D.C. Cir. 1983); Nichols v. Hughes, 721 F.2d 657, 659 (9th Cir. 1983); Ballenger v. Marsh, 708 F.2d 349, 350 (8th Cir. 1983).

correction board and the correction board enters a final decision denying relief. Hurick, 782 F.2d at 987; Heisig v. United States, 719 F.2d 1153, 1155 (Fed. Cir. 1983); Bonen, 666 F.2d at 539; Eurell v. United States, 566 F.2d 1146, 1148 (Ct. Cl. 1977); Homcy v. United States, 536 F.2d 360, 363 (Ct. Cl. 1976); Kirby v. United States, 201 Ct. Cl. 527, 531 (1973); Mathis, 391 F.2d at 939; Friedman v. United States, 310 F.2d 381, 396 (Ct. Cl. 1962); Lipp v. United States, 301 F.2d 674, 675 (Ct. Cl. 1962). The reasoning underlying that line of cases is that, since their creation, the correction boards have been regarded as a permissive administrative remedy and that an application to a correction board is therefore not a mandatory prerequisite to filing a Tucker Act suit challenging the discharge. Richey v. United States, 322 F.3d 1317, 1325 (Fed. Cir. 2003); Heisig, 719 F.2d at 1155 ("[A]lthough relief has usually been first sought from military correction boards since their creation in 1946, there is here no requirement of exhaustion of administrative remedies prior to pursuit of judicial review."). Accordingly, the failure to seek relief from a correction board not only does not prevent the plaintiff from suing immediately, but also does not prevent the cause of action from accruing.

The cases involving the effect of the availability of a correction board remedy on the statute of limitations are simply special applications of a broader principle of administrative law. As a general matter, if a dispute is subject to mandatory administrative proceedings, the plaintiff's claim does not accrue until the conclusion of those proceedings. Crown Coat Front Co. v. United States, 386 U.S. 503, 511 (1967); Lins v. United States, 688 F.2d 784, 786 (Ct. Cl. 1982); Nager

Elec., 368 F.2d at 853. On the other hand, this court and the Court of Claims have long held that, in Tucker Act suits, a plaintiff is not required to exhaust a permissive administrative remedy before bringing suit. As a corollary of that rule, the court has held that a plaintiff's invocation of a permissive administrative remedy does not prevent the accrual of the plaintiff's cause of action, nor does it toll the statute of limitations pending the exhaustion of that administrative remedy. See Brighton Vill. Assocs. v. United States, 52 F.3d 1056, 1060 (Fed. Cir. 1995); Lins, 688 F.2d at 788; Camacho v. United States, 494 F.2d 1363, 1369 (Ct. Cl. 1974); Iran Nat'l Airlines Corp. v. United States, 360 F.2d 640, 642 (Ct. Cl. 1966); Steel Improvement & Forge Co. v. United States, 355 F.2d 627, 630-31 (Ct. Cl. 1966); Lipp, 301 F.2d at 675-76 (citing numerous cases); Empire Inst. of Tailoring, Inc. v. United States, 142 Ct. Cl. 165, 168 (1958); Love v. United States, 122 Ct. Cl. 144, 146 (1952); Nitro Chem. Corp. v. United States, 71 Ct. Cl. 453, 457 (1931); Battelle v. United States, 7 Ct. Cl. 297, 300-01 (1871).

Without contesting this general rule as applied in other types of Tucker Act suits, Mr. Martinez invites us to overrule all of our prior decisions holding that resort to a correction board is permissive, not mandatory, and to announce a new rule that a service member's cause of action challenging his discharge in the Court of Federal Claims does not accrue until after the service member has exhausted all administrative remedies before a correction board. For the reasons set forth below, we decline that invitation.

C

The Supreme Court has noted that congressional intent is of "paramount importance" to any exhaustion inquiry. Patsy v. Bd. of Regents of Fla., 457 U.S. 496, 501 (1982); see also Sims v. Apfel, 530 U.S. 103, 107 (2000); Darby v. Cisneros, 509 U.S. 137, 144-45 (1993). When Congress expressly requires exhaustion of administrative remedies before suit is brought, exhaustion is, of course, mandatory. When Congress has not spoken directly to the issue, "appropriate deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme." McCarthy v. Madigan, 503 U.S. 140, 144 (1992).

The Supreme Court applied that principle in Darby v. Cisneros and held that in light of section 10(c) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 704, courts may not require exhaustion of administrative remedies upon appeal from final agency action, except where exhaustion is expressly required by statute or rule. Although section 10(c) had often been overlooked in the past, the Court concluded that it was clear that Congress "explicitly require[d] exhaustion of all intra-agency appeals mandated either by statute or by agency rule," but that "it would be inconsistent with the plain language of § 10(c) for courts to require litigants to exhaust optional appeals as well." Darby, 509 U.S. at 147.

The Supreme Court has reached the same conclusion with respect to actions brought under 42 U.S.C. § 1983, the general federal civil rights statute. The Court held that the Congress that enacted that statute did not intend to require plaintiffs to exhaust state remedies before seeking to vindicate their constitutional rights in federal court. Accordingly, the Court rejected the argument that courts could require exhaustion of administrative remedies as a matter of judicial discretion in cases in which exhaustion would seem to serve a useful purpose. See Patsy, 457 U.S. at 502-07.

The Supreme Court has employed the same reasoning, and reached the same result, in rejecting arguments that Tucker Act plaintiffs may be required to exhaust their administrative remedies before filing suit on their claims. Such a requirement, the Court has held, would be inconsistent with the statutory provision defining the rights of Tucker Act claimants and with the statute of limitations for bringing Tucker Act suits.

In Clyde v. United States, 5 Ct. Cl. 134 (1869), the then-young Court of Claims had promulgated a rule of practice requiring all claimants who filed actions under the predecessor to the Tucker Act to seek relief first from the executive department in question before prosecuting claims before the court. In an opinion occupying less than one page, the Supreme Court made short work of that rule. Clyde v. United States, 80 U.S. 38 (1871). The Court explained that the rule "was really an additional restriction to the exercise of jurisdiction by [the Court of Claims]. It required the claimant to do what the acts giving the court

jurisdiction did not require him to do before it would assume jurisdiction of his case." Id. at 39. To require such a step was a matter for Congress, not for the Court of Claims, the Supreme Court held. By imposing an exhaustion requirement that was not prescribed by statute, the Court explained, the Court of Claims "was establishing a jurisdictional requirement which Congress alone had the power to establish." Id.

More recently, in Soriano v. United States, 352 U.S. 270 (1957), the Supreme Court reached the same conclusion, using reasoning that is directly applicable to the present case. In Soriano the plaintiff was seeking just compensation for material requisitioned by the Philippine guerrilla forces during World War II. The plaintiff argued that he was required to exhaust his available administrative remedies by requesting and obtaining a ruling on his claim by the Army Claims Service as a prerequisite to filing a Tucker Act suit in the Court of Claims. In that case, as in this one, it was in the plaintiff's interest to argue that the exhaustion of administrative remedies was required, because otherwise the six-year statute of limitations for Tucker Act suits would have expired prior to his filing in the Court of Claims.

The Supreme Court rejected the plaintiff's argument based on the language of the Tucker Act. The Court held that the Tucker Act strictly defined the class of cases in which Congress consented to suit against the sovereign and that courts were not empowered to engraft additional limitations on the Court of Claims' exercise of its jurisdiction. The "limitations and conditions upon which the Government consents to be sued must be strictly

observed, and exceptions thereto are not to be implied." Soriano, 352 U.S. at 276. In the course of its discussion, the Soriano Court referred with approval to a line of Court of Claims cases that had held, in various factual settings, that the running of the six-year statute of limitations for Tucker Act claims was not tolled during the period that the claims were under consideration by various administrative agencies. Id. at 275 n.6.

The same analysis, as applied to this case, leads to the same conclusion: that Congress did not authorize postponement of the running of the limitations period while optional administrative remedies were being exhausted. Of course, if Congress had made clear that service members had to exhaust their remedies in the correction boards before filing suit under the Tucker Act, the statute of limitations for the Tucker Act suit would not begin to run until the correction board process was completed. We find no indication of any such congressional intention, however. In fact, as we discuss below, the historical evidence supports this court's consistent interpretation of the correction board legislation as creating a permissive avenue for collateral administrative relief, not a mandatory prerequisite to suit.

D

The correction boards were first created as a result of a 1946 statute that authorized the Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury (who had jurisdiction over the Coast Guard at that time) to set up boards of civilian review "to correct any military or naval record where in their judgment

such action is necessary to correct an error or to remove an injustice." Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 207, 60 Stat. 812, 837. The correction boards were created to relieve Congress of the burden of considering private bills to correct alleged errors and injustices in the military system, as evidenced by the fact that in the same statute that authorized the creation of the correction boards, Congress enacted a provision stating that no private bill or resolution authorizing the correction of military or naval records would be received or considered by either house of Congress. Id. § 131, 60 Stat. 831; see also S. Rep. No. 82-923, 82d Cong., 1st Sess. (1951), reprinted in 1951 U.S.C.C.A.N. 2469; 40 Op. Att'y Gen. 504, 505 (1947). In 1951, Congress elaborated on that statutory provision by requiring that requests for corrective action ordinarily be filed within three years of the discovery of the alleged error or injustice, and authorizing the respective Departments to make payments to claimants when such payments were found to be due as a result of correction board action. Pub. L. No. 82-220, 65 Stat. 655 (1951).

Prior to the enactment of the correction board legislation, the Court of Claims had addressed monetary claims by service members that fell within the scope of the Tucker Act, and at the same time Congress had addressed claims by service members—monetary as well as nonmonetary—through private bills. There was, of course, no suggestion that before filing a Tucker Act suit a service member had to apply for and be denied the benefit of a private bill. When Congress authorized the creation of correction boards to take the place of private bills for service members, it

did not suggest that service members would be barred from obtaining relief under the Tucker Act until and unless they had sought relief from the pertinent correction board. Contemporaneous Tucker Act cases regularly held that exhaustion of administrative remedies was not required unless Congress, the agency in question, or the contract in suit, expressly compelled it. See L.E. Myers Co. v. United States, 105 Ct. Cl. 459, 478 (1946); Ylagan v. United States, 101 Ct. Cl. 294 (1944); John P. Moriarty, Inc. v. United States, 97 Ct. Cl. 338 (1942); Pink v. United States, 85 Ct. Cl. 121, 124 (1937); Cohen, Goldman & Co. v. United States, 77 Ct. Cl. 713, 730 (1933). In light of the well-settled state of Tucker Act jurisprudence at the time, as well as the absence of any suggestion that the new remedy would be mandatory rather than permissive, we decline to attribute any such intention to Congress or to read the correction board legislation as imposing any mandatory exhaustion requirement sub silentio.

Several years after the enactment of the correction board legislation, a question arose whether a service member challenging a discharge action was required to exhaust administrative remedies in a correction board before seeking judicial relief. In Ogden v. Zuckert, 298 F.2d 312 (D.C. Cir. 1961), the Court of Appeals for the District of Columbia Circuit answered that question in the negative, holding that a service member could bring a court challenge to military action even though he had not first sought relief from the pertinent correction board. The court explained that when Congress created the correction boards, there was

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> no indication of congressional consciousness or intention that judicial jurisdiction would be affected. . . . The congressional plan is for the Boards to assist the Secretaries in correcting errors and injustices in military records. This plan was not designed to bring the Boards into the original administrative process of making the records, a process which is participated in by the various other boards . . . which considered and reviewed plaintiff's case before the Secretary acted.
>
> The Board furnishes a means by which to seek correction of error or injustice, but neither statute nor regulation requires this means to be pursued as a condition to finality of the Secretary's action. The relief which might ensue after Board consideration, similar to relief previously obtained by private bills enacted by Congress, is through a procedure over and above that which guides the administrative process itself to its end.

Id. at 314-15. As we have noted, the Court of Claims reached the same result in a long line of cases, including a thorough treatment of the issue by Judge Davis in Friedman v. United States, 310 F.2d 381 (Ct. Cl. 1962).

E

Mr. Martinez points out that some courts of appeals have required plaintiffs ordinarily to exhaust their administrative remedies in the correction boards before filing actions seeking equitable relief against the military. See, e.g., Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991); Linfors v. United States, 673 F.2d 332, 333-34 (11th Cir. 1982); Diliberti v. Brown, 583 F.2d 950, 951 (7th Cir. 1978); Hodges v. Callaway, 499 F.2d 417 (5th Cir. 1974). Other courts have taken a different approach, authorizing district courts to assume jurisdiction over such military claims, but ruling in particular cases that district courts should stay judicial proceedings until the applicable correction board remedies have been exhausted. See, e.g., Montgomery v. Rumsfeld, 572 F.2d 250, 252-55 (9th Cir. 1978) ("competing interests can best be accommodated if the court requires the exhaustion of remedies, but retains jurisdiction of the matter"); Sohm v. Fowler, 365 F.2d 915 (D.C. Cir. 1966) (district court not required to dismiss suit while correction board proceeding was pending); Nelson v. Miller, 373 F.2d 474 (3d Cir. 1967).

The plaintiffs in the court of appeals cases on which Mr. Martinez relies sought equitable relief, not monetary relief under the Tucker Act. The courts therefore did not have to address the question whether imposing an exhaustion requirement would be inconsistent with the language of the Tucker Act and its statute of limitations, as well as the Supreme Court decisions regarding exhaustion under the Tucker Act, such as Soriano. Moreover, it is unclear whether the court of appeals decisions on which Mr. Martinez relies have survived the Supreme Court's decision in Darby

v. Cisneros, 509 U.S. 137 (1993), which restricted judicial discretion to impose exhaustion requirements in agency review cases arising under the Administrative Procedure Act. See Daugherty v. United States, 212 F. Supp. 2d 1279 (N.D. Okla. 2002) (holding that Darby is inconsistent with requiring exhaustion of correction board remedies in district court proceedings to review challenges to military personnel actions); Crane v. Sec'y of the Army, 92 F. Supp. 2d 155, 161-63 (W.D.N.Y. 2000); Kosnik v. Peters, 31 F. Supp. 2d 151 (D.D.C. 1998). Contra E. Roy Hawkens, The Exhaustion Component of the Mindes Justiciability Test Is Not Laid to Rest by Darby v. Cisneros, 166 Mil. L. Rev. 67 (2000) (arguing that Darby is inapplicable to military claims). Thus, the decisions on which Mr. Martinez relies are neither controlling for us nor do we regard them as persuasive authority on the quite different question whether correction board remedies must be exhausted before a plaintiff may file a Tucker Act suit for back pay and affiliated relief.

F

Mr. Martinez argues that it would be sound policy to require exhaustion of a potential correction board remedy before permitting former service members to file suit in the Court of Federal Claims. It is true that there are often benefits to be obtained from pre-suit exhaustion of administrative remedies. See McKart v. United States, 395 U.S. 185, 193-95 (1969). Indeed, a recent congressionally mandated study resulted in a proposal for new legislation that would require service members to exhaust their remedies before the correction boards before obtaining judicial review of military personnel matters. See Report of the

Committee on Judicial Review of Military Administrative Personnel Actions of the Department of Defense (1996). In light of the current state of the law, however, that is a step that must be taken either by Congress through legislation or by the military departments through regulation. Moreover, there are significant competing policy reasons that counsel against imposing a rigid exhaustion requirement.

First, requiring resort to a correction board would necessarily extend the period within which a discharge claim for back pay could be brought. Such an extension would naturally increase the risk that discharge claims would be stale, along with the risk of lost evidence, unavailable witnesses, and faded memories. See Friedman, 310 F.2d at 401-02. In addition, the passage of time would increase the potential liability of the United States for back pay and would make the availability of corrective action more difficult to effect. Thus, it might be relatively easy to effectuate corrective action—such as directing that an officer be reinstated and reconsidered for promotion—within a short period after the officer's improper discharge, but it would ordinarily be much more difficult to unravel the effects of an improper discharge many years after the fact.

Second, it is by no means clear that an exhaustion requirement would be favorable to service members generally. Although an exhaustion requirement may work to the advantage of Mr. Martinez in the unusual circumstances of this case, many service members might prefer to have the option of seeking an immediate judicial remedy rather than having to go through a correction board before having

access to a court. A mandatory exhaustion requirement would make that course of action unavailable.

Third, as a result of procedures employed by the Court of Federal Claims, the rule that the limitations period in Tucker Act suits is not tolled pending resort to correction board remedies does not deny claimants the right to review of correction board decisions nor does it deprive the Court of Federal Claims of the authority to issue a stay pending exhaustion of administrative remedies in appropriate cases. All that a service member need do to preserve both the judicial remedy and the right to a reviewable decision by the correction board is to file suit within six years of the date of discharge and request that the court action be stayed until the correction board proceeding is completed. The Court of Federal Claims often follows that practice in military claims cases. See Richey, 322 F.3d at 1320; Engels v. United States, 678 F.2d 173, 174-75 (Ct. Cl. 1982); Friedman, 310 F.2d at 398. Nor is there any doubt as to the courts' authority to stay judicial proceedings pending correction board action. The Tucker Act provides express authorization for a court to require resort to administrative remedies such as the correction boards in cases in which the court deems it appropriate. See 28 U.S.C. § 1491(a)(2) ("In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just."). That statutory authority gives the courts the flexibility to require exhaustion of correction board remedies in cases in which the benefits of exhaustion are

applicable, but to proceed directly to adjudication if the court concludes that resort to the correction board would not serve a useful purpose. Moreover, the risk of parallel administrative and judicial proceedings has been obviated by case law requiring that when the administrative process is initiated after judicial relief has been sought and is still pending, the claimant must exhaust the correction board process before returning to the Court of Federal Claims. Richey, 322 F.3d at 1325-26; Cunningham v. United States, 549 F.2d 753, 765 (Ct. Cl. 1977).

Finally, even if the service member chooses to complete correction board proceedings before filing suit, the generous six-year limitations period for Tucker Act suits will normally accommodate the correction board proceedings with ample time remaining within which a suit can be filed. This case demonstrates that point. Mr. Martinez obtained a ruling from the Correction Board in August 1995, only three and one-half years after his separation from active duty. At that point, he still had two and one-half years within which to file a timely complaint in the Court of Federal Claims. Although he failed to file his complaint within that period, he has not suggested any circumstances that made it impossible for him to do so, nor has he suggested that the applicable rule was unsettled or that he was misled into believing that he could file his Tucker Act action more than six years after the date of his separation from active duty. The fact that in this unusual case Mr. Martinez failed to take the simple step of filing his complaint within six years of his separation from active duty is not a sufficient reason for us to change a rule that has been

applied for many years, without causing apparent difficulty, and which may afford some additional flexibility to litigants.

Accordingly, we hold that Mr. Martinez's cause of action for recovery of the monetary losses he suffered as a result of his discharge from active duty, and for the ancillary equitable relief that he sought in his complaint, accrued on the date of the discharge. The statute of limitations for filing suit in the Court of Federal Claims therefore began to run at that time.[3]

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3 It is clear that Mr. Martinez's cause of action did not accrue at the time he was discharged from the United States Army Reserve. Between 1992 and 1997, Mr. Martinez was a member of the Reserves, but not serving on active duty. He was finally separated from the Reserves in March 1997, which was within six years of the date he filed his complaint in the Court of Federal Claims. His complaint, however, requested reinstatement to active duty in the Reserves, not merely reinstatement in the Reserves in a non-active-duty status. Because Mr. Martinez was separated from active duty in 1992, his monetary and incidental equitable claims with respect to his active duty status accrued at that time, not in 1997. Service members on active duty are entitled to basic pay pursuant to 37 U.S.C. § 204(a), while reservists are paid only for the drills and training they actually attend, see 37 U.S.C. §§ 204(a)(2), 206(a). As such, Mr. Martinez's suit for back pay is limited to the basic pay he would have received had he remained on active duty, because he would not be entitled to a pay remedy for improper discharge from the Reserves. See Palmer v. United States, 168 F.3d 1310, 1314 (Fed. Cir. 1999) ("The consequence of th[e] difference in pay entitlement between full-time active duty personnel and those serving part-time reserve duty is that a member who is serving in part-time reserve duty in a pay billet, or was wrongfully removed from one, has no lawful pay claim against the United States for unattended drills or for unperformed training duty."); Dehne v. United States, 970 F.2d 890, 894 (Fed. Cir. 1992).

IV

Mr. Martinez's second argument is that even if the statute of limitations has run on an action directly challenging his separation from active duty and consequent loss of pay, his complaint states a separate cause of action on which the statute of limitations has not run. He argues that because his complaint directly challenges the Correction Board's decision and not just his separation from active duty, he has stated a separate cause of action asserting error by the Correction Board in not granting him relief. That separate cause of action, he asserts, did not accrue until the Correction Board rendered its decision in August 1995. Accordingly, he claims that his complaint, filed in August 1998, was timely.

The problem with Mr. Martinez's "second cause of action" theory is that in order for Mr. Martinez's claim to be within the Tucker Act jurisdiction of the Court of Federal Claims, it had to be for money owing to him, and the only money that he claims is owing to him is the back pay withheld from the date of his separation from active duty in February 1992 and the forfeiture of pay pursuant to his Article 15 punishment in 1991. If he is entitled to the money that forms the basis for his Tucker Act suit, that right accrued in 1991 and 1992 when he was deprived of the money that is the subject of the action, not in 1995 when the Correction Board in effect reaffirmed the Army's decision that he was not entitled to those funds. Thus, the cause of action for back pay stemming from Mr. Martinez's separation from active duty first accrued on the date of his separation from active duty. It did not accrue for a

second time when the Correction Board refused to grant Mr. Martinez's request for relief, including back pay to the date of his separation.

A

Mr. Martinez's "second cause of action" theory for extending the limitations period is not new. The same argument was presented to and rejected by the Court of Claims 40 years ago in Friedman v. United States, 310 F.2d 381 (Ct. Cl. 1962), and the passage of time has not given the argument any greater force.

Addressing the same issue in the context of a claim for retirement benefits, Judge Davis, writing for the Court of Claims, explained the point well:

> It is argued that, once the Correction Board has acted, the claim is founded upon the 1951 Act providing for Correction Boards to change military records to correct errors or remove injustices. But this is again to confound a procedural remedy with a substantive cause of action. . . . The Correction Board statute merely provides one remedy for enforcing [the substantive] right . . . The Act of Congress upon which the claim is founded—in the sense of the Tucker Act—is the substantive retirement statute, not the provision for boards or other methods for implementing that right. . . . The 1951 Act is no different in kind from comparable federal statutes providing a remedy for rights found on other legislation or other regulations.

310 F.2d at 399-400. Nor does the availability of judicial review of correction board decisions change the analysis. Again, as Judge Davis explained:

> [I]t does not follow from the general existence of judicial review for Correction Board decisions that those decisions create a new substantive cause of action which has its own, new, limitations period. That a tribunal's rulings are subject to judicial review means that the administrative decision is open to scrutiny by a court, if a timely judicial proceeding is filed—not that the administrative tribunal's decision, in itself, becomes the new measure of the plaintiff's judicial rights. There is a profound difference between a legislature's providing for further review of a ruling on a cause of action and its creating a new and independent cause of action. . . . Judicial review and substantive claim are entirely separate concepts. The former is usually provided to see whether the latter is valid or has been properly enforced, but the establishment of review does not ipso facto create a new substantive claim.
>
> In short, as applied to our problem, the existence of judicial review does not, in itself, supply any basis for asserting that the limitations period runs from the time of the Correction Board's decision. All that the existence of judicial review means is that the Board's decision will be reviewed, in a proper case, if a timely suit is brought.

Id. at 397 (emphasis in original). Accord Real v. United States, 906 F.2d 1557, 1560 (Fed. Cir. 1990); Hurick, 782 F.2d at 987; Giesler v. United States, 230 Ct. Cl. 723, 725 (1982); Ramsey v. United States, 215 Ct. Cl. 1042, 1043 (1978); Eurell v. United States, 566 F.2d 1146, 1148 (Ct. Cl. 1977); Merriott v. United States, 163 Ct. Cl. 261, 263 (1963).

As discussed in Part III above, it is well settled that the statute of limitations for Tucker Act claims is not tolled by the claimant's exercise of his right to seek permissive administrative review of his claim. That principle cannot be subverted by simply recharacterizing the effect of a correction board decision on the limitations period as generating a second cause of action rather than tolling the limitations period on the first. Just as the limitations period is not tolled by resort to a nonmandatory administrative remedy, a Tucker Act cause of action does not accrue for a second time when the prospective plaintiff exercises such rights. Thus, for example, in certain circumstances a party with a Tucker Act cause of action may seek and obtain relief for the same claim from the Government Accounting Office. The statute of limitations, however, runs from the date that the cause of action initially accrued, and a new cause of action does not accrue if and when the Government Accounting Office denies relief. See Fitzgerald v. United States, 226 Ct. Cl. 542, 544 (1980); Air Express Int'l Corp. v. United States, 439 F.2d 157, 159 (Ct. Cl. 1971); Burich v. United States, 366 F.2d 984, 986 (Ct. Cl. 1966); Iran Nat'l Airlines Corp. v. United States, 360 F.2d 640, 642 (Ct. Cl. 1966).

The reason underlying this rule is the same as the reason underlying the rule against tolling the limitations period for nonmandatory administrative remedies: The creation of a permissive administrative remedy, either by statute or by regulation, does not affect the time period for which Congress has waived sovereign immunity and permitted judicial relief to be sought. To make the point outside the context of the correction boards, consider the following hypothetical case: Suppose a government agency provided an additional option through which an aggrieved party could seek relief from agency action, for example by giving a particular agency official the power to overrule agency decisions and grant monetary relief to private claimants. The creation of such an office would give claimants an additional, permissive option in seeking to vindicate their claims against the agency. But if the agency official denied a particular claim, it would not make sense to say that the denial would give rise to a second accrual of the original claim, so that the statute of limitations for a Tucker Act action on that claim would begin anew as of the date of the agency official's denial. Hurick simply applies that principle to claims submitted to the correction boards, and, in our view, properly so.

B

Mr. Martinez argues that this court's decision in Hurick is contrary to the decisions of several other courts of appeals. In particular, he cites Ortiz v. Secretary of Defense, 41 F.3d 738 (D.C. Cir. 1994); Blassingame v. Secretary of the Navy, 811 F.2d 65, 70 (2d Cir. 1987); Smith v. Marsh, 787 F.2d 510 (10th Cir. 1986); Dougherty v. U.S. Navy Bd. for Corr. of Naval Records, 784 F.2d 499 (3d Cir. 1986); and Geyen v. Marsh, 775 F.2d 1303 (5th Cir. 1985).

The cases on which Mr. Martinez relies were all nonstatutory review actions under the APA seeking equitable relief, not Tucker Act actions for money. Each involved a request for an upgrade in the classification of the plaintiff's discharge, in most instances from "undesirable" to "honorable." Because the plaintiffs did not seek monetary relief, and thus had no Tucker Act remedy, they were able to invoke the APA's waiver of sovereign immunity for actions against the United States "seeking relief other than money damages," 5 U.S.C. § 702, and they were able to challenge the correction boards' decisions as they were "adversely affected or aggrieved," id., by "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704. See Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230-31 n.4 (1986).

As challenges to final agency action, the APA actions challenged the board decisions that denied requests for changes in discharge status; they did not challenge the underlying discharges themselves. Because the APA actions did not turn on a claim for money, the actions could be said to accrue at the time of the challenged agency action—the action of the correction board in question—rather than at the time of the action that caused the plaintiff monetary loss—the discharge itself. Indeed, the very cases on which Mr. Martinez relies recognized the distinction between an APA action to review a correction board decision denying an upgrade in discharge status and a back pay suit challenging the discharge itself under the Tucker Act. See Blassingame, 811 F.2d at 72; Smith, 787 F.2d at 511-12; Dougherty, 784 F.2d at 501-02 & n.10; Geyen, 775 F.2d at 1308-09; see also Ballenger v. Marsh, 708

F.2d 349 (8th Cir. 1983) (expressly distinguishing between back pay claims under the Tucker Act and a claim for "corrective" action upgrading a discharge from dishonorable to honorable).

The difference is important. The cause of action in Mr. Martinez's Tucker Act suit was for the denial of money; that cause of action therefore accrued when he was separated from active duty and his monetary injury began. His cause of action did not accrue when the Correction Board declined to overturn his separation, because that action did not cause him monetary injury, but merely failed to remedy the injury he had previously suffered. Because the Court of Federal Claims lacks APA jurisdiction, see Murphy v. United States, 993 F.2d 871, 874 (Fed. Cir. 1993), the trial court was not empowered to treat this case as a nonmonetary challenge to final agency action by the Correction Board; under the Tucker Act, the single cause of action necessarily arose at the time of the action that had monetary consequences for Mr. Martinez, and that was the date of his discharge from active duty.

To be sure, in monetary actions brought under the Tucker Act, the Court of Claims and the Court of Federal Claims have often reviewed not only the underlying discharge actions, but also the actions of correction boards. See Chappell v. Wallace, 462 U.S. 296, 303 (1983) ("Board decisions are subject to judicial review and can be set aside if they are arbitrary, capricious, or not based on substantial evidence." (citing Court of Claims cases)); Porter v. United States, 163 F.3d 1304 (Fed. Cir. 1998); Sanders v. United States, 594 F.2d 804 (Ct. Cl. 1979); Friedman v. United States,

141 Ct. Cl. 239, 259 (1958). Thus, we have treated a claim "for back pay within our jurisdiction" as "an appropriate occasion for reviewing the actions of the correction boards." Sanders, 594 F.2d at 812. And in so doing, we have granted relief if we have found that the correction board's decision is arbitrary, capricious, unsupported by substantial evidence, or contrary to law. Porter, 163 F.3d at 1311; Armstrong v. United States, 205 Ct. Cl. 754, 761 (1974). But because the underlying basis for the suit is the denial of back pay, see Skinner v. United States, 594 F.2d 824, 831 (Ct. Cl. 1979), we have consistently held that the limitations period is established by the date of accrual, which is the date on which the service member was denied the pay to which he claims entitlement.

Accordingly, the approach taken by other circuits in adjudicating non-monetary challenges to correction board action is not inconsistent with the approach we have taken in the very different context of Tucker Act suits. We therefore reject Mr. Martinez's suggestion that we should overrule Hurick in order to bring ourselves into line with other circuit courts that have reached different results regarding the statute of limitations applicable to military discharge cases.

C

The dissent asserts that a new cause of action for monetary relief accrued in this case when the correction board acted, because the correction board statute, 10 U.S.C. § 1552, is a money-mandating statute. That is, because Mr. Martinez would have been entitled to various forms of relief, including money, if he had prevailed before the correction board, the dissent

argues that a new cause of action for that relief necessarily accrued at the time of the correction board decision. That theory conflates the remedy granted by the correction board statute with the underlying cause of action for improper discharge. Regardless of what procedure Mr. Martinez invoked to seek relief, his underlying cause of action for money was still necessarily based on the alleged improper discharge: if the discharge was not unlawful, Mr. Martinez is not entitled to monetary relief.

At the time of his separation, Mr. Martinez had a right to sue for improper discharge and to obtain money if he could prove his case. At the time the correction board acted, he still had that right. The injury caused by the separation was not altered or exacerbated by the correction board action. The only thing that was different was that he had exercised the optional remedy provided him by section 1552, which offered him an alternative means of obtaining relief. Because Mr. Martinez is entitled to monetary relief only if he can show that he was improperly separated, a suit in the Court of Federal Claims that purports to challenge the correction board decision is in essence an action challenging his separation. Thus, the correction board statute provides for a monetary remedy, but the underlying cause of action to which that remedy applies is unlawful termination. And that cause of action accrued at the time of discharge.

Section 1552 is "money-mandating" in the sense that it requires that the government grant monetary relief to a service member if the correction board determines that the service member's record should be corrected in a way that entitles the service member to

back pay. See Sawyer v. United States, 930 F.2d 1577, 1580 (Fed. Cir. 1991); Sanders v. United States, 594 F.2d 804, 812-13 (Ct. Cl. 1979). But section 1552 is not the source of the right to back pay; that right comes from a different statute, such as the Military Pay Act, 37 U.S.C. § 204. Accordingly, even though section 1552 mandates the payment of money if the correction board concludes that the service member's discharge was unlawful, section 1552 is not the "money-mandating" statute that gives rise to the cause of action that provides the basis for a Tucker Act suit in the Court of Federal Claims.[4]

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[4] We disagree with the government's suggestion that our cases are in conflict as to whether the correction board statute, 10 U.S.C. § 1552, is a "money-mandating" statute as that term is used in Tucker Act cases. The government cites a statement in Dehne v. United States, 970 F.2d 890, 894 (Fed. Cir. 1992) (section 1552 "does not mandate pay at all"), which it contends is inconsistent with decisions such as Blum v. United States, 227 Ct. Cl. 555, 559 n.3 (1981) (section 1552 "is a statute expressly mandating compensation, and we can enforce it if the plaintiff should have been retired for disability but the Correction Board illegally failed to so find"). We discern no conflict. The point made by the court in Dehne was simply that section 1552 is not the source of the right to back pay, which must come from some other statute, and that absent an underlying "pay-mandating statute on which to base his Tucker Act claim," the correction board statute did not provide a basis for the plaintiff to obtain relief from the Court of Federal Claims. Dehne, 970 F.2d at 894. A different analysis applies when the correction board has granted relief and the service member seeks to enforce or challenge the implementation or scope of the remedial order, since in those cases the question whether the original discharge was lawful is no longer in issue and accrual therefore does not occur at the time of the allegedly improper discharge. See Bonen, 666 F.2d at 539-40; Homcy, 536 F.2d at 364-65; DeBow v. United States, 434 F.2d 1333, 1335 (Ct. Cl. 1970); Friedman, 310 F.2d at 395.

If the dissent were correct, the creation of any new, optional remedy that could result in the payment of money would give rise to a new Tucker Act cause of action. To expand upon the hypothetical case posited earlier, suppose Congress decided to provide yet another layer of administrative protection against improper discharge by allowing a soldier to request that the Secretary of Defense reopen any discharge case at any time, even after a correction board proceeding, and requiring the Secretary to reinstate the soldier with back pay if the Secretary concluded that the discharge was improper. Under the dissent's view, the creation of such an optional remedy would have the effect of creating yet a third Tucker Act cause of action based on the same discharge, with the six-year statute of limitations beginning to run anew from the Secretary's action denying the request for relief. That regime is contrary to the basic principle, established in the Friedman case and applied routinely since, that a Tucker Act action for money accrues when the claimant has exhausted all mandatory administrative remedies, and it does not "re-accrue" if and when the claimant subsequently seeks to exercise any optional administrative remedy including the remedy of application to a correction board.

V

Mr. Martinez argues that, even assuming he has only a single cause of action and his cause of action accrued as of his discharge date, the statute of limitations was nonetheless tolled until November 4, 1993, when his ex-wife issued a sworn statement accusing the sergeant's husband of fabricating the allegations about the purported affair between the sergeant and Mr. Martinez. He contends that although

he was aware that he was being separated from active duty on February 25, 1992, he was not aware that his discharge was the product of a conspiracy between his ex-wife and others she enlisted to assist her in obtaining sole custody of her child. In response, the government argues that equitable tolling does not apply to the statute of limitations set forth in 28 U.S.C. § 2501 and that, even if it does, there is no basis for finding equitable tolling in this case.

A

The government's argument as to the inapplicability of equitable tolling to section 2501 is based on three propositions. The government argues (1) the statute of limitations is a limited waiver of sovereign immunity; (2) in section 2501 Congress expressly waived sovereign immunity only for actions brought within six years of accrual or, in the case of persons under legal disability or "beyond the seas at the time the claim accrues," within three years after the disability ceases; accordingly, (3) every other suit brought more than six years after accrual is barred by sovereign immunity and thus is outside the jurisdiction of the Court of Federal Claims.

The government relies on Soriano v. United States, 352 U.S. 270 (1957), as its principal authority for the proposition that a statute of limitations against the federal government cannot be read to contain any provision for equitable tolling.[5] In Soriano, the

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[5] The Soriano Court's treatment of the issue of equitable tolling, see 352 U.S. at 275-77, is distinct from its treatment of the issue of accrual, see id. at 273-75, which we discussed in Part III-C, above.

plaintiff argued in pertinent part that his cause of action for just compensation for supplies taken from him by Philippine guerrillas during the Japanese occupation of the Philippines was tolled during the pendency of the war. The Supreme Court rejected that argument. The Court noted that exceptions to statutes of limitations and conditions on which the government may be sued are not to be implied, and that in other statutes of limitations Congress had included exceptions for wartime, but not in section 2501. Soriano, 352 U.S. at 275-77.

It is well established that statutes of limitations for causes of action against the United States, being conditions on the waiver of sovereign immunity, are jurisdictional in nature. See Block v. North Dakota, 461 U.S. 273, 287 (1983); Frazer v. United States, 288 F.3d 1347, 1351 (Fed. Cir. 2002); Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988); Jones v. United States, 801 F.2d 1334, 1335 (Fed. Cir. 1986). As the Supreme Court has explained, however, that does not mean that courts may never recognize equitable tolling of statutory limitations periods in suits against the government. Instead, the Court has made clear that whether equitable tolling is available in suits against the government turns on congressional intent, i.e., whether Congress intended the particular statute of limitations at issue to be subject to tolling and, if so, under what circumstances.

In Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990), the Supreme Court addressed Soriano and concluded, notwithstanding the restrictive language in that case, that equitable tolling is available at least in some actions against federal entities. The

Court explained that once Congress has waived sovereign immunity, "making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, expansion of the congressional waiver." Id. at 95. That principle, the Court explained,

> is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation. We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so.

Id. at 95-96. See also Young v. United States, 535 U.S. 43, 49-50 (2002) ("Congress must be presumed to draft limitations periods in light of this background principle [of equitable tolling]."). Having embraced the principle of equitable tolling, however, the Supreme Court declined to give it an expansive application. While the Court suggested that the doctrine would apply "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period" or "where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass," the Court explained that the doctrine had been applied "sparingly" by federal courts in the past and would not in any event be applied "to what is at best a garden variety claim of excusable neglect." Irwin, 498 U.S. at 96.

In subsequent cases, the Supreme Court has made clear that Irwin did not mean that all limitations periods governing suits against the government would be subject to equitable tolling. In both United States v. Brockamp, 519 U.S. 347 (1997), and United States v. Beggerly, 524 U.S. 38, 48 (1998), the Court rejected arguments that equitable tolling was available under the particular statutes of limitation at issue in those cases. In Brockamp, the Court emphasized the "unusually emphatic" language of section 6511 of the Internal Revenue Code of 1986, the statute limiting the period for filing tax refund claims. Section 6511, the Court explained, restates the limitations period "several times in several different ways," 519 U.S. at 351, and "sets forth its limitations in a highly detailed technical manner that, linguistically speaking, cannot easily be read as containing implicit exceptions." Id. at 350. Moreover, the Court noted that section 6511 contained explicit exceptions to its basic time limits, which did not include equitable tolling. Id. at 351. Finally, the Court explained that the underlying subject matter—tax collection—is inconsistent with a system of case-specific exceptions for equitable tolling, which could create significant administrative difficulties. Id. at 352. In summary, the Court stated: "Section 6511's detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together, indicate to us that Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote." Id.

In Beggerly, the Court similarly rejected an argument that equitable tolling is available under a limitations statute governing suits against the United States, in this case the 12-year statute of limitations for suits under the federal Quiet Title Act, 28 U.S.C. § 2409(g). The Court noted the "unusually generous" length of the limitations period, and the fact that the statute contained an express provision that the limitations period would not begin to run until the plaintiff "knew or should have known of the claim of the United States," which the Court characterized as already effectively allowing for equitable tolling. Beggerly, 524 U.S. at 48. Under those circumstances, the Court concluded, "extension of the statutory period by additional equitable tolling would be unwarranted." Id. at 49.

Following the Supreme Court's lead, we have determined that certain statutes of limitations are subject to equitable tolling and that others are not, depending on the language and context of the particular limitation statute at issue. See Jaquay v. Principi, 304 F.3d 1276, 1286 (Fed. Cir. 2002) (en banc) (equitable tolling available in a veterans claims case); Bailey v. West, 160 F.3d 1360, 1362-68 (Fed. Cir. 1998) (en banc) (same); Brice v. Sec'y of Health & Human Servs., 240 F.3d 1367, 1370-71 (Fed. Cir. 2001) (equitable tolling not available in a compensation action under the National Childhood Vaccine Injury Act); RHI Holdings, Inc. v. United States, 142 F.3d 1459, 1461-63 (Fed. Cir. 1998) (equitable tolling not available in a tax refund case).

Since the Supreme Court's decision in Irwin, we have not decided whether equitable tolling applies with respect to the general statute of limitations for

Tucker Act claims, 28 U.S.C. § 2501. In fact, we have recently declined to decide "whether equitable principles may ever toll the statute of limitations codified in § 2501." Frazer v. United States, 288 F.3d 1347, 1353 (Fed. Cir. 2002). To be sure, section 2501 appears to have more in common with the limitations statute at issue in Irwin than with the statutes at issue in Brockamp and Beggerly. Actions under section 2501 are, by definition, for money damages and thus have much in common with ordinary actions at law between private parties. Moreover, unlike the tax statute in Brockamp, section 2501 is not highly technical and was not designed to apply exclusively to a complex administrative program in which equitable tolling could be disruptive. On the other hand, section 2501 differs from the Irwin statute in that it contains its own tolling provision for persons "under legal disability or beyond the seas at the time the claim accrues," a factor that the Court in Brockamp regarded as weighing against recognizing other nonstatutory exceptions to the limitations period. See Brockamp, 519 U.S. at 351-52. Because the matter is not free from doubt, we follow the same course here that we followed in Frazer: We decline to decide whether equitable tolling is generally available under section 2501, because even if we held that it is, Mr. Martinez has not made a sufficient factual showing to invoke equitable tolling in this case, for the reasons given by the Court of Federal Claims, as we explain below.

B

Our cases, like the Supreme Court's decision in Irwin, make clear that equitable tolling against the federal government is a narrow doctrine. As the

Supreme Court noted in Irwin, mere excusable neglect is not enough to establish a basis for equitable tolling; there must be a compelling justification for delay, such as "where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." Irwin, 498 U.S. at 96. In this case, the Court of Federal Claims held that that standard was not satisfied, and we agree.

Mr. Martinez argues that until his wife issued her sworn statement regarding the alleged fabrication of charges against him, he had no basis on which to seek relief and thus, until that time, was excused from the requirement of filing his complaint. Mr. Martinez, however, was fully aware of the injury he had suffered at the time he was separated from active duty, and he was aware that, as he views the matter, he was the victim of fabricated charges. The only thing that was different after his ex-wife made her sworn statement in November 1993 was that his claim then had more support than his uncorroborated word. The fact that he had sounder support for his claim at that point, however, is not a sufficient basis to establish equitable tolling. See Vincin v. United States, 468 F.2d 930, 933 (Ct. Cl. 1972) ("this court has refrained from stretching the statute of limitations in an illegal discharge case so that it would commence to run not from the date of discharge but from the date of some subsequent decision illustrating its illegality"); Japanese War Notes Claimants Ass'n v. United States, 373 F.2d 356, 359 (Ct. Cl. 1967). The statute of limitations therefore began to run in February 1992, and by the time Mr. Martinez filed his action in the Court of Federal Claims, the limitations period on his action had run.

C

Mr. Martinez alludes to another argument with regard to the timeliness of the complaint, but it too does not provide any ground for relief. In his brief, Mr. Martinez invokes authority from this court holding that the accrual of a claim against the United States is suspended, for purposes of 28 U.S.C. § 2501, until the claimant knew or should have known that the claim existed. That legal principle is well settled in our cases. See, e.g., Alliance of Descendants of Tex. Land Grants v. United States, 37 F.3d 1478, 1482 (Fed. Cir. 1994); Catawba Indian Tribe v. United States, 982 F.2d 1564, 1571-72 (Fed. Cir. 1993); Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1577 (Fed. Cir. 1988); Kinsey v. United States, 852 F.2d 556, 557 n.* (Fed. Cir. 1988); Welcker v. United States, 752 F.2d 1577, 1580 (Fed. Cir. 1985); Giesler v. United States, 230 Ct. Cl. 723, 725 (1982). The government agrees with that legal rule, which is based on a construction of the term "accrues" in section 2501. That rule is distinct from the question whether equitable tolling is available under that statute, although the term "tolling" is sometimes used in describing the rule.

For the same reasons that his equitable tolling claim is factually insufficient, however, Mr. Martinez's "accrual suspension" argument fails as well. The "accrual suspension" rule is "strictly and narrowly applied: . . . [The plaintiff] must either show that defendant has concealed its acts with the result that plaintiff was unaware of their existence or it must show that its injury was 'inherently unknowable' at the accrual date." Welcker, 752 F.2d at 1580. Mr. Martinez was not unaware of the existence of his injury and the

acts giving rise to his claim. As of the date of his discharge from active duty, he knew that he had been discharged and, as far as he was concerned, his discharge had been unlawfully procured. Nothing about his ex-wife's statement disclosed the existence of a claim of which he was previously unaware. The statement simply provided him with additional ammunition with which to pursue the claim. The acts of alleged fabrication may have contributed to Mr. Martinez's injury, but the fact of his injury was never unknown to him. Mr. Martinez's claim therefore did not accrue on November 4, 1993, when his wife made the statement regarding the alleged fabrication of the charges against him.

VI

Finally, Mr. Martinez argues that, if this court agrees with the trial court with respect to the statute of limitations, it should transfer the non-monetary portion of this case to a United States District Court under 28 U.S.C. § 1631 rather than dismiss the action.

Section 1631 provides that if a civil action is filed in a court that "finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action . . . to any other such court in which the action . . . could have been brought at the time it was filed." The problem with Mr. Martinez's transfer request is that because his complaint sought money and relief ancillary to the request for money, the Court of Federal Claims could have granted all the relief requested in the complaint if the complaint had been timely filed. Section 10(c) of the APA provides for judicial review of "final agency action for which there

is no other adequate remedy in a court." 5 U.S.C. § 704. Because there was an adequate remedy in the Court of Federal Claims for the claims set forth in Mr. Martinez's complaint, a district court would not have had APA jurisdiction over those claims (and the waiver of sovereign immunity under section 10(a) of the APA, 5 U.S.C. § 702, would not have been available). See Consol. Edison Co. v. United States, 247 F.3d 1378, 1383 (Fed. Cir. 2001); Kanemoto v. Reno, 41 F.3d 641, 644 (Fed. Cir. 1994); Mitchell v. United States, 930 F.2d 893, 896 (Fed. Cir. 1991). The fact that the complaint was untimely filed in the Court of Federal Claims does not mean that that court could not offer a full and adequate remedy; it merely means that Mr. Martinez did not file his complaint in time to take advantage of that remedy. Mitchell, 930 F.2d at 897. Accordingly, Mr. Martinez's money-based complaint could not have been brought in the district court in the first instance, and we therefore lack authority under section 1631 to transfer it to the district court at this juncture.

This case is not like James v. Caldera, 159 F.3d 573 (Fed. Cir. 1998), in which a federal district court transferred a serviceman's claim to the Court of Federal Claims. On the serviceman's appeal, this court held that certain of the plaintiff's claims—in particular, his claims as to the bar to his reenlistment—were not for money damages and the Court of Federal Claims lacked jurisdiction over those claims. Because the Court of Federal Claims lacked jurisdiction over some of the plaintiff's claims, the court in James reversed the portion of the district court's order transferring those claims to the Court of Federal Claims, and it directed the district court to reconsider whether it had

jurisdiction with respect to another claim. In this case, by contrast, none of the claims asserted in the complaint—if they had been timely asserted—would have been outside the competence of the Court of Federal Claims, as either direct monetary claims or as claims for relief ancillary to the grant of a monetary remedy. Accordingly, we decline Mr. Martinez's request that we transfer this case to a United States District Court for further proceedings in that forum.

Each party shall bear its own costs for this appeal.

AFFIRMED.

United States Court of Appeals for the Federal Circuit

99-5163

GABRIEL J. MARTINEZ,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

PLAGER, Senior Circuit Judge, with whom Chief Judge MAYER and Circuit Judges NEWMAN, GAJARSA, LINN, and DYK join, dissenting.

As I read it, the majority opinion gives short shrift to a well-established proposition of law: a money-mandating statute or regulation provides a basis for a cause of action under the Tucker Act. The corollary to that proposition is equally well-established: the statute of limitations barring such cause of action begins to run from the time of an adverse decision under the statute or regulation, not before. The majority's failure to properly apply these propositions to the case before us leaves me with no alternative but to respectfully dissent.

Gabriel Martinez petitioned the Army Board for Correction of Military Records (hereafter Board or Correction Board) for relief from the terms of his discharge from the Army. The Board denied his request. Martinez subsequently filed a complaint in the Court of Federal Claims alleging that the decision of the Board was arbitrary and capricious and an abuse

of discretion. At the time he filed his suit, more than six years had elapsed since the date of Martinez's initial discharge, though not from the date of the decision of the Correction Board.

Constrained by our precedent, specifically Hurick v. Lehman, 782 F.2d 984 (Fed. Cir. 1986), the Court of Federal Claims dismissed the complaint as time-barred by the statute of limitations, 28 U.S.C. § 2501, on the ground that the statute runs from the date of discharge, not from the date of the Board's decision.

As a matter of law, that rule is no longer supportable, if it ever was. The statutes and regulations applicable to the Army Correction Board leave little doubt that they are 'money-mandating'; a complaint such as Captain Martinez's challenging the correctness of a decision of the Board properly lies under the Tucker Act, and the statute of limitations must necessarily run from the time of the Board decision. Applying the correct law to the facts of the Martinez case, the judgment of the Court of Federal Claims should be reversed.

1.

A veteran who wishes to have judicial review of a military service's decision to discharge him can bring suit in the Court of Federal Claims. The jurisdictional basis for the suit is the Tucker Act, 28 U.S.C. § 1491, which provides that court with jurisdiction over certain kinds of suits against the United States. Included are suits for money "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department." 28 U.S.C. § 1491(a)(1).

In United States v. Testan, 424 U.S. 392 (1976), the Supreme Court explained that the Tucker Act merely confers jurisdiction in the Court of Federal Claims whenever a substantive right exists; a substantive right is one, independent of the Tucker Act, that is enforceable against the United States for money damages. This concept gave rise to what is often referred to as the requirement that a plaintiff invoke a 'money-mandating' source, such as a federal statute or a regulation of an executive department, as part of his cause of action under the Tucker Act. Failure to establish the existence of such a money-mandating source means that the plaintiff fails to state a claim on which relief can be granted. Gollehon Farming v. United States, 207 F.3d 1373, 1379 (Fed. Cir. 2000); Palmer v. United States, 168 F.3d 1310, 1312-13 (Fed. Cir. 1999) (explaining the difference in Tucker Act jurisprudence between a lack of jurisdiction and a failure to state a claim on which relief can be granted).

If a claim states a cause of action under the Tucker Act, the Act expressly provides that the Court of Federal Claims may, in addition to the monetary remedy, "issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records." 28 U.S.C. § 1491(a)(2). The Act further authorizes the court to "remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just." Id.

Under what is known as the Little Tucker Act, 28 U.S.C. § 1346(a)(2), the same suit, presumably with the same possible remedies, see Bobula v. United States Dep't of Justice, 970 F.2d 854, 859 (Fed. Cir. 1992), can

be filed in a federal district court, provided only that the amount at issue does not exceed $10,000. Whether decided in the Court of Federal Claims or in a district court, any appeal from the trial court's judgment in a suit brought under either of the Tucker Acts will be reviewed on appeal by, and decided under the law of, the Court of Appeals for the Federal Circuit. 28 U.S.C. § 1295(a)(2), (3).

Mr. Martinez argues that his cause of action did not accrue until the date of the Correction Board decision, 1995 (initial decision) or 1997 (reconsideration), because he challenged only the Board's refusal to correct his records and not the Army's original discharge decision. (His complaint clearly focuses his challenge on the decision of the Correction Board.) Under either of these dates his 1998 filing in the Court of Federal Claims would be timely, i.e., within six years of the time his cause of action accrued. He asserts that had the court undertaken a review of the merits of his case, that review would be limited to consideration of the administrative record compiled by the Board, citing RCFC 56.1(a), and subject to the traditional administrative law 'arbitrary and capricious' review standard.

The Government responds that the Court of Federal Claims, following Hurick, correctly held that Mr. Martinez's cause of action is based on his alleged wrongful discharge in 1992, not on the Board's decisions regarding that discharge which occurred some years later. The Government asserts that the Hurick decision rests upon sound principles: (1) Congress has only assented to a Tucker Act suit relating to an allegedly unlawful discharge, and

the suit may only be construed as a suit for monetary relief; (2) the long-standing rule has been that a claim for unlawful discharge accrues upon the date of loss of pay or discharge, and thus the claim first accrues on that date, because no other act by either party remains to be performed before suit may be filed; (3) the plaintiff chose to sue in the Court of Federal Claims, and chose to sue for money; his challenge to the Correction Board's decision is merely ancillary to his jurisdiction-creating pay claim. Thus the denial by the Board does not create a new cause of action. -

I do not agree with the Government's approach to the question of whether a Board decision creates a new cause of action, or with the majority's approval of that approach. The Government posits that Mr. Martinez's challenge to the adverse Board decision is merely ancillary to his discharge and, thus, did not create a new cause of action, even if, ultimately, implementation of a Correction Board decision might give rise to liability for damages by the United States. The Government relies for support for its position on King v. United States, 395 U.S. 1 (1969), which reversed a 1968 decision by the Court of Claims.

The King case is hardly support for the Government's position. First, the case turned on whether the Court of Claims had authority to grant declaratory relief in the absence of a claim for actual, presently due money damages; the Court of Claims thought it had authority to grant the requested relief, the Supreme Court said it did not. That case is not on point with regard to the issue before us.

Second, our predecessor court, the Court of Claims, specifically rejected that same argument by the Government regarding the King case twenty years ago, holding that 10 U.S.C. § 1552, the Correction Board statute, provided an independent basis for a cause of action. Blum v. United States, 227 Ct. Cl. 555, 559 n.3 (1981).

The point is not whether Mr. Martinez had a cause of action for an allegedly wrongful discharge when it occurred in 1992; no one says he did not. Nor is the point whether an appeal to a Correction Board is necessarily 'ancillary' to an allegedly wrongful discharge, in the sense that without the earlier alleged wrong, there would have been no appeal to the Board; the relationship between the two is obvious. Rather, the question here is whether, at the time of the Correction Board decision, the statutes and regulations governing the Correction Board were 'money-mandating' so that, in accordance with the Supreme Court's ruling in Testan, the decision of the Board creates as a matter of law a separate cause of action under the Tucker Act. If so, then a complainant has a cause of action under the Tucker Act, a cause of action that arises when the decision is rendered. That is not a question of parsing prior precedent, or of judicial syllogisms. That is a question of statutory and regulatory construction; the answer lies in an examination of the applicable statutes and regulations.

2.

Section 1552 of title 10 of the United States Code provides for the correction of military records and for payment of claims incident thereto. The statute authorizes the Secretary of a military department to correct any military record of the Secretary's department "when the Secretary considers it necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a)(1). With certain limited exceptions, "such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department." Id. Ordinarily a request for correction must be filed within three years after the claimant discovers the error or injustice, but the Board may waive the requirement "in the interest of justice." Id. § 1552(b).

Importantly, subsection (c) provides that the Secretary "may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant." In other contexts we have held that a statute using the term "may" rather than "shall" is nevertheless 'money-mandating.' See McBryde v. United States, 299 F.3d 1357, 1362 (Fed. Cir. 2002) ("[T]he use of the word 'may' does not, by itself, render a statute wholly discretionary, and thus not money-mandating."); Doe v. United States, 100 F.3d 1576, 1579-83 (Fed. Cir. 1996) (holding that the federal moiety statute, though using the term "may" and thereby according the Secretary some discretion, is money-mandating). However,

because of the clear mandate of the regulations adopted by the Army pursuant to this statute, as explained next, it is unnecessary to decide whether this statute alone would be sufficient basis for a Tucker Act remedy.

In the case of the Army, the Secretary has adopted regulations, 32 C.F.R. § 581.3, establishing the Army Board for Correction of Military Records, and the procedures governing the Board's activities. The chair of the Board is directed to ensure that the applicant receives a full and fair opportunity to be heard, and to certify the record of the proceedings. Id. § 581.3(b)(3). The Board members are instructed to review all applications that are properly before them to determine the existence of error or injustice, id. § 581.3(b)(4)(i), and if persuaded that material error or injustice exists, to direct changes in military records to correct the error or injustice. Id. § 581.3(b)(4)(ii).

Under the regulations, the Director, Defense Finance and Accounting Service (DFAS), is responsible for settlement of monetary claims arising from activities of the Correction Board. Specifically, 32 C.F.R. § 581.3, subsection (h), entitled "Claims/Expenses," provides that "[t]he ABCMR [Correction Board] will furnish DFAS copies of decisions potentially affecting monetary entitlement or benefits. The DFAS will treat such decisions as claims for payment by or on behalf of the applicant." Id. § 581.3(h)(2)(i) (emphasis added). The subsection further provides that "[t]he DFAS will settle claims on the basis of the corrected military record." Id. § 581.3(h)(2)(ii) (emphasis added).

Read together, these provisions of statute and regulations leave little doubt that the decision of the Board has direct consequences regarding an applicant's monetary remedy. A favorable result before the Board mandates that the applicant be paid any monies due him; no discretion exists in the hands of the paymaster, beyond that of determining the correct amount due. This clearly meets the test set out by the Supreme Court: "the asserted entitlement to money damages depends upon whether any federal statute [or regulation] 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" Testan, 424 U.S. at 400 (citation omitted). (Although not an issue in Testan, the Tucker Act expressly includes, along with an Act of Congress, a regulation of an executive department as a money-mandating source.)

There can be no doubt that once a favorable decision by the Correction Board is rendered, the statute and regulations create an enforceable obligation against the Government, and that no further action by the applicant to perfect that obligation is required. The converse then is true: since the statute and regulations governing the Board processes and outcome are 'money-mandating,' a negative decision by a Board that is challenged in a well pleaded complaint as being in violation of law, thus denying the applicant a monetary remedy otherwise due, would constitute a cause of action under the Tucker Act. As our predecessor court stated in Blum v. United States:

We do not agree with [the Government] that Ray [v. United States, 453 F.2d

> 754 (Ct. Cl. 1972)] can be distinguished solely on the ground that in Ray the Board had already ruled in the plaintiff's favor on disability retirement before the case was filed here. If we were ultimately to find in the present suit that the Board had acted wrongfully in denying plaintiff's request for a review of his retirement classification, and that plaintiff was actually entitled to receive disability retirement, we would have the power, under Ray and 10 U.S.C. § 1552 supra, to grant plaintiff the relief he seeks, regardless of the fact that the Correction Board had refused to take the initiative and correct its own error.

227 Ct. Cl. at 558-59 (footnotes omitted).

Under the plain meaning of the statutes and regulations applicable to a decision of the Army Correction Board relating to an alleged unlawful discharge, there is created a separate cause of action reviewable independently of the original discharge decision. A claim challenging a Correction Board decision relating to a discharge therefore accrues on the date of the Board's final decision.

Regrettably, the majority opinion addresses the statutory framework only glancingly, and the regulatory provisions not at all. See maj. op. at 31-32. I do agree with the majority that it is unnecessary to

accept the Government's invitation to review and resolve conflicts in the prior precedents of this court and its predecessor, the Court of Claims. Over the years the cases have dealt with disparate problems, with disparate results.

Some cases involved disability claims, and some involved military discharges as such, rather than the aftereffects of a Correction Board decision. Some cases appear to announce rules that are in direct conflict, though ultimately not. For example, our predecessor court in the Blum case, cited above, stated without question that § 1552, the statute at issue here, is indeed money-mandating: "10 U.S.C. § 1552 is a statute expressly mandating compensation, and we can enforce it if the plaintiff should have been retired for disability but the Correction Board illegally failed to so find." Blum, 227 Ct. Cl. at 559 n.3 (holding that § 1552 was a sufficient basis for stating a claim for relief under the Tucker Act, even though not pled as such). Yet a later decision of this court stated the contrary. See Dehne v. United States, 970 F.2d 890, 894 (Fed. Cir. 1992) ("[B]y its terms, section 1552(c) does not mandate pay at all. Rather, it provides for appropriate discretionary payment by the Secretary in certain circumstances."). The Dehne court held that the veteran had failed to state a claim on which relief can be granted; Blum was not cited. The apparent conflict in the law is resolved by our established rule that earlier precedents must be followed unless changed by an en banc court.

The Court of Claims early on made clear that it had jurisdiction to directly review decisions by the Correction Boards. See Sanders v. United States, 594

F.2d 804, 811 (Ct. Cl. 1979) (en banc) ("[W]e have reviewed these board actions with great frequency since 1951 when the present correction board statute became law, explicitly authorizing the payment of claims consequent upon the correction of military records."). Yet a few cases made a point of noting that when the Correction Board decision involved only partial relief, the court had power to review the case under the so-called half-a-loaf theory, meaning that a complainant was entitled to full relief, not partial, and that justified judicial intervention. See, e.g., DeBow v. United States, 434 F.2d 1333, 1335 (Ct. Cl. 1970).

Whatever one wishes to make of the various turns and twists announced in cases decided over several decades, the issue before us remains straightforward: when the Army Correction Board undertook to decide Captain Martinez's appeal, were the statute and regulations governing the Board such that the consequences of a decision in his favor would be money-mandating? If the answer to that is yes, a petition, in a well-pleaded complaint, seeking review in the Court of Claims from a negative decision states a cause of action under the Tucker Act.

The majority opinion does not explain why § 1552 and the cited regulations adopted thereunder, not to mention prior governing precedent, do not satisfy the money-mandating requirement. What we get is a replay of the Government's circular argument. It begins with the premise that there is really only one cause of action in these cases, the original discharge cause of action; any further review, such as that of the Correction Board, is 'ancillary,' results from, is a consequence of, the original cause of action; therefore

there is no second cause of action when the Correction Board wrongfully acts, only the first cause of action being reheard a second time. That of course is entirely circular, since it begins with the conclusion that is the question.

The argument posed in that fashion avoids the fundamental question of the legal consequences that attach to a decision by a Correction Board. The failure to grasp the nettle is illustrated by the majority's hypothetical, used to illustrate its view of the law. See maj. op. at 27. The question is posed whether a decision by an agency official, who has power to grant relief from an agency's decision, could possibly create a new cause of action, one that is independent of the agency's earlier decision. The answer given by the majority is "if the agency official denied a particular claim, it would not make sense to say that the denial would give rise to a second accrual of the original claim, so that the statute of limitations for a Tucker Act action on that claim would begin anew as of the date of the agency official's denial." That's it; end of case.

If that argument arose in court, I would ask, "Why not, why doesn't it make sense? What are the consequences that attach to an affirmative decision by the agency official? Are there statutes and regulations we need to consider? Could the agency official's decision be considered money-mandating under the law? What about the Blum decision (quoted above), which holds that a negative decision is as much money-mandating as an affirmative one? And what about Sanders and Blum together, holding that Correction Board decisions—your agency official analog—are independently reviewable by our court,

and that the law governing the Boards is money-mandating?" At the least we would have a lively discussion.[6]

3.

Martinez's case does not stand simply on concluding that Hurick was in error, though an error repeated. Even if I were not persuaded that Hurick was wrongly decided, and even assuming that, at the time they were decided, Hurick and other military discharge cases could plausibly have relied on language in Friedman, it is clear today, in light of the now-effective statutes and regulations, that when a Correction Board decides a wrongful discharge case, such decision can be found to create a cause of action that is separate from the original discharge decision. At least that is the conclusion reached by every other federal court of appeals that has addressed the question; these circuits uniformly allow veterans six years to request judicial review of a Correction Board decision.

Other circuits get involved in these cases because a veteran who wishes to have judicial review of an adverse decision of a Correction Board regarding his discharge from the military, but eschews any

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[6] In response to the dissent, the majority favors us with yet another hypothetical, this time rising all the way to the Secretary of Defense. These are interesting academic inquiries, which might be relevant if they were supported by an explication of detailed statutes and regulations such as those under which the Army Correction Board operates. It is the legal fabric of decision, not the fact that a decision is possible, that determines what qualifies as 'money-mandating.'

interest in a money claim against the Government as a consequence of the discharge, has an alternative to a Tucker Act-based suit. Such a plaintiff can seek review of the decision of the Correction Board in a federal district court under the Administrative Procedure Act (APA), 5 U.S.C. § 702 et seq. The suit will be decided under the law of, and reviewed on appeal by, the appropriate regional circuit court of appeals. The difference stems from whether the veteran requests a purely administrative remedy—for example, purging of the record, reinstatement, promotion—or whether the veteran as part of the relief sought would be entitled to a monetary award for denied pay.

In the purely administrative remedy context, the action is based on § 702 of the APA, which waives the United States's sovereign immunity for claims in certain cases involving a decision of an administrative agency. The military services are considered administrative agencies for this purpose.

The Second Circuit addressed the issue in Blassingame v. Secretary of the Navy, 811 F.2d 65, 68 (2d Cir. 1987). A Vietnam veteran sought upgrade of an undesirable discharge to an honorable discharge. The Navy's Correction Board (as well as its Discharge Review Board, see 10 U.S.C. § 1553(a)) had denied relief. Thirteen years after his discharge, but within one year of the Correction Board decision, suit was brought in federal district court. The district court held, inter alia, that the statute of limitations barred the suit to review the decision of the Correction Board.

The Court of Appeals reversed, holding: (1) since the veteran had expressly relinquished his demand for monetary damages, appeal was properly in the Second Circuit, and not in the Federal Circuit under the Tucker Act; (2) the jurisdiction of the district court lay under 28 U.S.C. § 1331(a), federal question jurisdiction, and APA § 702, waiver of sovereign immunity; (3) the six year statute of limitations for civil actions against the United States, 28 U.S.C. § 2401(a), applies, but the cause of action accrues at the time of the Correction Board decision, not, as the Government argued and the district court held, from the time of the underlying discharge.

In reaching that conclusion, the Second Circuit reviewed the history of the 1940s legislation establishing the several boards, and the development since then of judicial review of agency action under the APA. The court noted particularly the emphasis placed by the Supreme Court in Harmon v. Brucker, 355 U.S. 579 (1958), on judicial review of agency action unless there is clear and convincing evidence that Congress intended to foreclose such review. Blassingame, 811 F.2d at 71.

The court pointed out that the Government's view to the contrary would in some circumstances preclude altogether judicial review of Correction Board action. That circumstance, the court noted, could occur in a number of ways. For example, by statute veterans have fifteen years to take certain discharge cases to the Discharge Review Board, 10 U.S.C. § 1553(a), and three years after that to appeal the Review Board's decision to the Correction Board, 10 U.S.C. § 1552(b). Under the Government's view, a veteran whose board reviews

were completed within six years from the date of discharge could obtain judicial review, but a veteran whose board reviews extended beyond that would be denied any judicial review. As the court emphasized, that created disparate results, and was inconsistent with Harmon in that there was no reason to think Congress intended to preclude judicial review of agency action in that fashion. Blassingame, 811 F.2d at 71-72.

The Second Circuit took particular note of the Federal Circuit's contrary position in Hurick, saying:

> Although we acknowledge the vast experience of the Federal Circuit and its predecessor regarding challenges by veterans to their discharges, we note that the leading case relied on by that circuit, Friedman was decided in 1962, before it became clearer over the intervening years that there is a presumption in favor of judicial review of agency action.

Id. at 71.

In reaching its conclusion that the cause of action accrues at the time of the Correction Board decision, not at the time of the underlying discharge, the Second Circuit followed with approval the same conclusion reached in similar cases in the Third, Fifth, and Tenth Circuits. See Dougherty v. United States Navy Bd. for Corr. of Naval Records, 784 F.2d 499 (3d Cir. 1986); Geyen v. Marsh, 775 F.2d 1303 (5th Cir. 1985); Smith v. Marsh, 787 F.2d 510 (10th Cir. 1986). No circuit other than ours follows Hurick.

The decision of the Second Circuit, citing that of the Fifth, particularly noted that review of a Correction Board decision should be distinct from direct review of the underlying discharge because, although the factual record may be similar, the focus of the former is on the action of the Correction Board rather than on that of the discharge officials. Blassingame, 811 F.2d at 72; Geyen, 775 F.2d at 1308-09. As in the case before us, the Correction Board may consider evidence not in the original record, 32 C.F.R. § 581.3(c)(2)(iii), and, in cases in which the veteran was required to apply first to a Discharge Review Board, it must also consider policy and procedure changes implemented subsequent to the discharge. Geyen, 775 F.2d at 1308-09 (citing 32 C.F.R. § 70.9(c)(1), which provides Army Discharge Review Board standards); see also Blassingame, 811 F.2d at 72-73 (citing 32 C.F.R. § 724.903, which provides Naval Discharge Review Board standards). The issue for judicial review as these courts see it is whether, on the factual record before the Correction Board, its decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706; Blassingame, 811 F.2d at 72; Geyen, 775 F.2d at 1309.

In support of the majority's refusal to change this circuit's position on the matter, it might seem that, in light of the opportunity provided in these other circuits, there is no particular reason why we should bother to correct our law. But getting a case into a regional circuit under the APA, and avoiding the consequences of this circuit's Hurick decision, may not be as simple as it first appears. See Mitchell v. United States, 930 F.2d 893 (Fed. Cir. 1991). Equally importantly, the current scheme tends to discourage a

veteran, who seeks monetary as well as other relief, from exhausting available administrative remedies before filing suit in federal court. A veteran who seeks only correction of his records—for example, when the only issue is whether a discharge should be upgraded from less than honorable to honorable—has six years from the date of a Correction Board decision to file a claim under the APA in federal district court, so there is little reason not to await the Correction Board decision before requesting judicial review. A veteran who challenges the nature of his discharge but whose suit incorporates money damages, however, must file a claim in federal court within six years of his initial discharge. Thus, he may need to file a claim in the Court of Federal Claims or district court before the Correction Board issues its decision, or in some cases before he has even applied to the Correction Board. This can be both wasteful and unnecessary.

4.

In my view, applying the correct law to the case of Mr. Martinez results in his getting his day in court; his challenge to the Correction Board's adverse decision would not be barred by the statute of limitations.

Mr. Martinez would be free to pursue his argument that the Correction Board acted arbitrarily and capriciously. I believe he has a well-pleaded complaint against the Board. With regard to the Article 15 proceeding under which Captain Martinez was punished, the Correction Board first stated that

> nonjudicial punishment [NJP] is appropriate in all cases involving minor offenses in which nonpunitive measures are considered inadequate or inappropriate. It is a tool available to commanders to correct, educate and reform offenders . . . ; to preserve a member's record of service from unnecessary stigma . . . ; and to further military efficiency by . . . requiring fewer resources than trial by court-martial.

Then, however, despite its recognition of the usefulness of the Article 15 proceeding in military discipline cases, the Board summarily concluded that "it [is] improbable that anyone would accept the NJP procedure, with its relaxed rules of evidence, if he truly believed that he was guiltless unless they believed that a trial by court-martial would elicit even more damaging information." Further, the Correction Board, in a one-sentence finding without further explanation, stated that Mrs. Martinez's sworn statement to the effect that the charges against Captain Martinez were phony was "unconvincing" since "she probably has a vested interest in the continuation of [Martinez's] career."

An opportunity for judicial review of administrative action is an essential element of due process. Applied to this case, it would afford an opportunity to test, among other issues, whether the Correction Board's view, that anyone who was guiltless would not accept the Article 15 Non Judicial Punishment procedure under the Uniform Code of Military Justice, expressed a view of the law inconsistent with basic Constitutional principles, and

with the Army's own rules.[7] To deny Martinez this opportunity is to deny a fundamental right, one clearly present under established law. At the same time, the Government would have the opportunity to show, if it can, that there is substantial evidence in the record to support the Board's declaration dismissing Mrs. Martinez's sworn statement on the basis of a possible interest in Mr. Martinez's career, a declaration Mr. Martinez alleges is without any record support.

In view of the manner in which I would decide this case, I find it unnecessary to address the other issues raised by Mr. Martinez, and dealt with at length by my colleagues. I respectfully dissent from the court's failure to provide Mr. Martinez with the process that is his due.

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[7] See Record of Proceedings Under Article 15, UCMJ, an executed copy of which was in the record before the Board, which states that, before a service member can be punished under Article 15, the deciding officer must be "convinced beyond a reasonable doubt that you committed the offense(s)." DA Form 2627, Record of Proceedings Under Article 15, UCMJ, para. 2, in this case completed and signed by BG Kilmartin. Accord U.S. Dep't of Army, Reg. 27-10, Legal Services: Military Justice, para. 3-18 (Aug. 20, 1999).

In the United States Court of Federal Claims
No. 98-662C
(Filed August 9, 1999)
[Entered August 9, 1999]

****
GABRIEL J. MARTINEZ, *
Plaintiff, *
*
v. *
*
THE UNITED STATES *
Defendant. *
****

ORDER

This military pay case is before the court of defendant's motion to dismiss, or, in the alternative, for judgment upon the administrative record and plaintiff's cross-motion for judgment upon the administrative record. For the reasons stated below, it is concluded that plaintiff's cause of action is barred by the statute of limitations. Accordingly, defendant's motion to dismiss is granted, defendant's alternative motion for judgment on the administrative record is denied as moot, and plaintiff's motion for judgment on the administrative record is denied.

BACKGROUND

Unless otherwise indicated, the facts are not in dispute. Plaintiff Gabriel J. Martinez was commissioned as a Reserve Office in the United States Army on August 3, 1979. He entered active duty on

October 15, 1980. Martinez was qualified as a military police office and served with great success in a variety of assignments. In 1984, he continued on active duty with the Active Guard/Reserve Program. He served with distinction and received various honors and awards.

On December 10, 1990, Martinez submitted a request for leave for December 25-18, 1990. He provided a Missouri address and phone number where he could be reached. However, on December 26, 1990, Martinez unit and the local police unsuccessfully attempted to contact him at the Missouri address; Martinez apparently was staying at another location in Michigan. In addition, Martinez did not sign out on leave or sign in when he returned as required by Army regulations.

On February 15, 1991, Brigadier General ("BG") Thomas J. Kilmartin, Martinez' commander, issued a Letter of Reprimand to Martinez as a result of his failure to provide a proper leave address, sign out on leave, or sign in when he returned. BG Kilmartin also informed Martinez that he was considering recommending that the Letter of Reprimand be filed in Martinez' Official Military Personnel File ("OMPF"). However, he stated that he would first consider any information Martinez desired to submit in response.

Martinez submitted a statement contending that, while he did not provide a correct leave address on his request form, he had given the correct Michigan address to his supervisor before departing. He also stated that on the date of departure, he worked too late to drop off his leave sign-out card at the personnel

counter as required by Army regulations and left it with his supervisor instead.

In a memorandum dated March 19, 1991, BG Kilmartin found that Martinez' version of events differed markedly from the recollection of his supervisors. BG Kilmartin also stated that he had no reason to doubt the honesty of the supervisors. Accordingly, he directed that the Letter of Reprimand be permanently filed in Martinez' OMPF.

In August 1991, Brad Simpson, a civilian and husband of a female sergeant, Shelly Simpson, submitted a sworn statemtn to the Army asserting that Seargeant Simpson admitted having an affair with Martinez between April and July 1991. Mr. Simpson also stated that he subsequently met with Martinez to discuss the affair and Martinez threatened to physically harm him and have him killed if he disclosed the affair to military personnel.

On August 5, 1991, BG Kilmartin issued a notice of proceedings under Article 15 of the Uniform Code of Military Justice. The notice stated that BG Kilmartin was considering whether Martinez should be punished under Article 15 for fraternization, adultery, communicating a threat, and impeding a witness. Martinez waived these rights and requested a closed hearing before BG Kilmartin.

The hearing was held on August 9, 1991. Several witnesses testified and evidence was submitted, including the sworn statement of Brad Simpson discussed above. One witness, Major Otis, testified that Sergeant Simpson admitted to him that

she had an affair with Martinez. Major Otis also stated that Sergeant Simpson told him that Martinez had been harassing her by making phone calls to her house. Another witness, Staff Sergeant Jones, who claimed to be a personal friend of Sergeant Simpson, also testified that Sergeant Simpson told her she had been having sexual intercourse with him on six or seven occasions between April and July 1991. Sergeant Simpson herself apparently was not called to testify.

In his defense, Martinez testified that brad Simpson had fabricated the affair in an effort to sabotage his efforts to obtain custody of his five-year-old daughter; Martinez and his former wife Rebecca, were divorced on November 19, 1990 and were in the middle of child custody proceedings. The Martinez' divorce was due in part to Rebecca Martinez' affair with John Shadley who apparently was a friend of Brad Simpson.

Sometime after this period, allegations were also made that Martinez had kidnapped and molested his daughter. These allegations caused the state of Missouri to file criminal charges against Martinez. The allegations were later shown to be false, however, and the charges were dropped.

At the close of the Article 15 hearing, BG Kilmartin found beyond a reasonable doubt that Martinez violated Army regulations by fraternizing and engaging in a sexual relationship with Sergeant Simpson, threatening Brad Simpson, and impeding Mr. Simpson from communicating Martinez' offenses to the proper authorities. BG Kilmartin imposed a punishment of forfeiture of two months' pay. He also

directed that the Article 15 be filed in the performance fiche of Martinez' OMPF.

On August 13, 1991, Martinez appealed BG Kilmartins' decision to the next officer in command. Martinez asserted that he had a alibi for the occasions when he supposedly was with Sergeant Simpson, relying on a statement from his fiancée and a copy of his softball team's schedule. He also contended that BG Kilmartin was biased against him because Martinez had previously submitted information to the Department of the Army Inspector General concerning possible fraternization by BG Kilmartin. (An investigation apparently was conducted but insufficient evidence of fraternization was uncovered.) Martinez' appeal was denied on September 23, 1991.

On October 16, 1991, a Secretary of the Army Ad Hoc Review Board recommended that the Department of the Army Active Duty Board ("DAADB") consider whether Martinez should remain on active duty. By memorandum dated February 11, 1992, the DAADB advised Martinez that he would be released from active duty due to misconduct. The DAADB also referred Martinez's case to the Commander, U.S. Army Reserve Personnel Center, with the recommendation that he be considered for elimination from the U.S. Army Reserve.

On February 25, 1992, Martinez was released from active duty and transferred to the U.S. Army Control Group. At the time of his release, Martinez had achieved the rank of Captain. He had eleven years, four months, and eleven days of continuous active duty. His form DD 214 "Certificate of Release or

Discharge From Active Duty," characterized his service as "Honorable" but state that his release was due to "Misconduct." Martinez received one-half separation pay in the amount of $21,036.29.

On April 16, 1994, an Army Reserve board of offices convened to consider whether Martinez should be removed from his status as a reserve officer. During a two-day hearing, the eight-member board considered the evidence of record and heard testimony from Martinez and other witnesses. In addition, the board received a sworn statement of Rebecca Martinez dated November 4, 1993. Ms. Martinez stated that John Shadley, with whom she had an affair, conspired with Brad Simpson to have Martinez disciplined by the Army in an effort to hinder his chances of prevailing in the child custody proceedings. Ms. Martinez also stated that Mr. Simpson admitted to her that his allegations concerning Mr. Martinez' purported affair with Sergeant Simpson were false.

On April 17, 1994, after considering all the evidence, the Army Reserve board of officers unanimously concluded that Martinez did not commit adultery, fraternize with Sergeant Simpson, threaten Brad Simpson, make false official statements to his supervisors, or otherwise commit misconduct unbecoming and officer. Accordingly, the board recommended that Martinez be retained in the U.S. Army Reserve. The recommendation was approved on March 8, 1995.

On May 26, 1994, Martinez was notified that he was not selected for promotion to Major.

On March 13, 1995, Martinez filed an application with the Army Board for Correction of Military Record ("ABCMR" or "board") requesting that the Letter of Reprimand, the Article 15, and any references to misconduct be expunged from his OMPF. He also requested that his separation from active duty be voided and that he be restored to active duty without any break in service. Finally, he requested that he be promoted to major with a retroactive date of rank and that he be paid his full back pay and allowances. In support of his application, Martinez relied on Ms. Martinez' November 4,1 993 statement as well as the Army Reserve board of officers' finding that he was "innocent" of all charges of misconduct.

On August 23, 1995, the ABCMR denied Martinez' application. The board found that the Army Reserve board of officers was empowered only to determine whether Martinez had committed misconduct which warranted his elimination as an officer in the Army Reserve and that its findings had no force or effect for any other purpose. The ABCMR also determined that the Letter of Reprimand and the Article 15 punishment were imposed in accordance with applicable laws and regulations. Consequently, the board found that Martinez' release from active duty on the basis of these disciplinary actions was proper.

In concluding that the Article 15 punishment was properly impose, the ABCMR relied on the fact that Martinez chose an informal, non-judicial hearing before BG Kilmnartin rather than a trial by court-martial. The board found it

> improbable that anyone would accept the [non-judicial punishment] procedure, with its relaxed rules of evidence (for example, hearsay can be and in this case was accepted), if he truly believed that he was guiltless unless he believed that a trial by court-martial would elicit even more damaging information. This is especially true in this case where the applicant had reason to believe that the officer imposing the [non-judicial punishment] might not treat him impartially.

Administrative Record ("AR") at 19. The board also found Rebecca Martinez' statement "unconvincing" on the ground that she "probably has a vested interest in the continuation of [Martinez'] career." AR at 20.

On December 26, 1996, Martinez requested that the ABCMR reconsider his application. In support, he contended that the Army Reserve board of officers did have the authority to re-adjudicate the charges of misconduct. He also stated that he chose the informal Article 15 proceeding instead of a trial by court-martial because he had been advised to do so by Army Trial Defense Services. Also, in an effort to show that BG Kilmartin was not impartial, Martinez contended that he stated at the Article 15 hearing that he "did not listen to child molesters," AR at 8, a reference to the allegations (later shown to be false) that Martinez molested his daughter. Finally, Martinez challenged the ABCMR's grounds for rejecting Rebecca Martinez' statement, arguing that she had no vested interest in the continuation of his military career.

On March 26, 1997, the ABCMR denied Martinez' request for reconsideration. The board again concluded that there was no evidence of probable error or injustice and that Martinez' arguments provided no basis for reversing the board's prior decision.

On February 20, 1997, Martinez was notified that he was passed over for promotion to Major for the second time. On March 25, 1997, in accordance with Army regulations, Martinez was separated from the U.S. Army Reserve.

On August 17, 1998, Martinez filed a compliant in this court alleging that the ABCMR's decisions were arbitrary, capricious, and unsupported by substantial evidence. The complaint seeks a order setting aside the board's decisions and directing that Martinez be reinstated on active duty and awarded back pay from February 25, 1992 to the date of reinstatement. Plaintiff also seeks a return of the pay forfeited pursuant to the Article 15 punishment. In addition, he requests that his military records be corrected to remove the Letter of Reprimand, the Article 15, and the reference to "Misconduct" on his Form DD 214. Finally, he demands that his corrected records be placed before a special selection board and that the board reconsider him for promotion to Major.

On November 13, 1998, defendant moved to dismiss the compliant or, in the alternative, for judgment on the administrative record. Defendant contends that plaintiff's cause of action must be dismissed because it is barred by the statute of limitations and because the issues raised are nonjusticiable. In the alternative, defendant contends

that it is entitled to judgment on the administrative record because the ABCMR's decisions are supported by substantial e idence.

With regard to the statute of limitations, defendant contends that plaintiff is essentially challenging the validity of the disciplinary actions taken against him in 1991. According to defendant, any claim based on these actions accrued, at the latest, on February 25, 1992, when plaintiff was released from active duty and his active duty pay was discontinued. Therefore, defendant reasons, the six-year statute of limitations expired on February 25, 1998. Since plaintiff did not file his complaint until August 17, 1998, his action is time-barred.

On January 14, 1999, plaintiff filed an opposition to defendant's motion an a cross-motion for judgment on the administrative record. With respect to the statute of limitation, plaintiff is not challenging the propriety of the disciplinary actions taken against him in 1991 or his February 25, 1992 release from active duty. Instead, he asserts that he is challenging the validity of the ABCMR's decisions not to correct his military records, reinstate him to active duty, and award him back pay. Since the complaint was filed within six years of the ABCMR's decisions, plaintiff reasons, his cause of action is not time-barred. Furthermore, plaintiff contends, even if the complaint is construed as a direct challenge to the disciplinary actions or his release from active duty, the statue of limitations should be tolled until November 4, 1993, when Ms. Martinez disclosed that Mr. Shadley and Mr. Simpson made false allegations against plaintiff. Since the complaint was filed within six years of

November 4, 1993, plaintiff argues, his action is not time-barred.

DISCUSSION

The time limit for filing a case in this court is governed by 28 U.S.C. § 2501, which requires that a claim be filed "within six years after such claim first accrues." 28 U.S.C. § 2501 (1994). "The time limit imposed by 28 U.S.C. § 2501 is jurisdictional and cannot be waived." *Colon v. United States*, 35 Fed. Cl. 515 (1996); *Hart v. United States*, 910 F. 2d 815, 818-19 (Fed. Cir. 1990). Moreover, as a jurisdictional requirement imposed by Congress as a condition of the government's waiver of sovereign immunity, the statute of limitations must be strictly construed. *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988).

"[A] claim 'first accrues' when all the events have occurred which fix the alleged liability of the defendant and entitle the plaintiff to institute an action." *Hopland Band of Pomo Indians*, 855 F.2d at 1577. A claim based on unlawful discharges or release from military service accrues on the date of discharge or release because that is the date the injury –i.e., the loss of pay – is incurred. See *Hurick v. Lehman*, 782 F.2d 984, 986 (Fed. Cir. 1986); *Bond v. United States*, 43 Fed.Cl.346, 348 (1999).

Plaintiff's monetary claims are for back active duty pay from February 25, 1992, the date he was released from active duty, to the date of reinstatement and for the return of pay forfeited pursuant to the Article 15 punishment imposed on August 9, 1991. Plainly, the back pay claim accrued on February 25, 1992, since that is when the injury – the loss of pay –

was incurred. Likewise, the claim for return of forfeited pay accrued on August 9, 1991, when the pay was forfeited and the injury incurred. Since plaintiff did not assert these claims within six years of the dates upon which they accrued, they are barred by 28 U.S.C. § 2501.

"To invoke this court's jurisdiction, plaintiff must demonstrate an entitlement to actual, presently-due money damages." *Vander Zyl v. United States*, 28 Fed. Cl. 85, 87 (1993) (citing *United States v. Testan*, 424 U.S. 392, 400 (1976)). Since plaintiff's monetary claims are time-barred, this court lacks jurisdiction over his ancillary claims for equitable relief in the form of an order directing the government to correct his military records to move the Article 15, the Letter of Reprimand, and any references to "misconduct" and to reconsider him for promotion on the basis of the corrected records. See *Black v. United States*, 28 Fed. Cl. 177, 181 (1993) ("The Court of Federal Claims may order the correction of military records only if the order of correction is 'an incident of the collateral to' a money judgment.") (citing 28 U.S.C. § 1491(a)(2) and *Voge v. United States*, 844 F.2d 776, 781 (Fed. Cir.), *cert. denied*, 488 U.S. 941 (1988); *Brown v. United States*, 3 Cl. Ct. 31, 47 (1983) (where claim for money judgment was dismissed, Claims Court had no jurisdiction over plaintiff's claim for correction of records and reinstatement), *aff'd*, 741 F.2d 1374 (Fed. Cir. 1984).[1]

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[1] Similarly, to the extent the complaint seeks an order directing the government to promote plaintiff to Major, this court lacks authority to provide such relief. "Hardly any rule of law is more well established than the one to the effect that courts are not empowered to direct the promotion of military personnel." *Ayala v. United States*, 16 Cl. Ct. 1, 3, (1988).

In any event, such equitable relief would be appropriate only if it were determined that the Letter of Reprimand and Article 15 were improper. As discussed above, any claim based on these disciplinary actions first accrued when they were imposed in 1991 or, at the latest, on February 25, 1992, when plaintiff was released from active duty. Since plaintiff did not file his claims for equitable relief within six years of either of these possible accrual dates, they are also time-barred under 28 U.S.C. § 2501.

Plaintiff's attempt to avoid the statue of limitations by characterizing this action as a challenge to the ABCMR's decisions rather than the propriety of the disciplinary actions taken against him or his release from active duty is futile. This strategy has been squarely rejected by the Federal Circuit "on the ground that the failure of the Correction Board to set aside a military discharge dose not give rise to a separate and independent claim, since that action is merely ancillary to the discharge that the former serviceman is seeking to change." *Hurick*, 782 F.2d at 987. The statute of limitations is not tolled by resort to optional administrative remedies, such as an appeal to a military records correction board. *Id.; see also Friedman v. United States*, 159 Ct. Cl. 1,25-29, 310 F.2d 381, 395-96 (1962), *cert. denied*, 373 U.S. 932 (1963)

* * *

Understanding of all the facts before the tolling ceases and the statue begins to run").[2]

CONCLUSION

Based on the foregoing, it is concluded that plaintiff's cause of action accrued on later than February 25, 1992. Therefore, pursuant to 28 U.S.C. § 2501, plaintiff was required to file his complaint on or before February 25, 1998. Since plaintiff did not file until August 17, 1998, his action is barred by the statue of limitations and must be dismissed. Accordingly, it is hereby **ORDERED**:

(1) Defendant's November 23, 1998 Motion to Dismiss is **GRANTED.**

The clerk is directed to dismiss to complaint;

(2) Defendant's alternative Motion for Judgment on the Administrative Record is **DENIED** as **MOOT**;

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[2] Although not raised by either party, it should be mentioned that the Soldiers' and Sailors' Relief Act of 1940 tolls the statue of limitations during periods of active military duty. 50 U.S.C. App. §§ 511, 525 (1994); see *Bickford v. United States*, 228 Ct. Cl. 321, 656 F.2d 636 (1981). Plaintiff was member of the Army Reserve following his release from active duty as a reservist toll the statute of limitations. See *Min v. Avila*, 991 S.W.2d 495, 504-07 (Tex. Ct. App. 1999); *Bowles v. Dixie Cab Ass'n*, 113 F. Supp. 324, 326 (D.D.C. 1953); *Stephen v. United States*, 490 F. Supp. 323, 325 (W.D. Mich. 1980). However, plaintiff has not alleged that he engaged in periods of active services as a reservist which would toll the statute of limitations long enough to preserve his claims.

(3) Plaintiff's January 14, 1999 Motion for Summary Judgment is **DENIED**;

(4) Each party must bear its own cost.

/s/ James F. Merow
James F. Merow
Senior Judge

STATUTES

10 U.S.C. § 1552

§ 1552. Correction of military records: claims incident thereto

(a)(1) The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. Except as provided in paragraph (2), such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department. The Secretary of Transportation may in the same manner correct any military record of the Coast Guard.

(2) The Secretary concerned is not required to act through a board in the case of the correction of a military record announcing a decision that a person is not eligible to enlist (or reenlist) or is not accepted for enlistment (or reenlistment) or announcing the promotion and appointment of an enlisted member to an initial or higher grade or the decision not to promote an enlisted member to a higher grade. Such a correction may be made only if the correction is favorable to the person concerned.

(3) Corrections under this section shall be made under procedures established by the Secretary concerned. In the case of the Secretary of a military department, those procedures must be approved by the Secretary of Defense.

(4) Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection (a)(1) unless the claimant or his heir or legal representative files a request for the correction within three years after he discovers the error or injustice. However, a board established under subsection (a)(1) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

(c) The Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be, or on account of his or another's service as a civilian employee. If the claimant is dead, the money shall be paid, upon demand, to his legal representative. However, if no demand for payment is made by a legal representative, the money shall be paid--

(1) to the surviving spouse, heir, or beneficiaries, in the order prescribed by the law applicable to that kind of payment;

(2) if there is no such law covering order of payment, in the order set forth in section 2771 of this title; or

(3) as otherwise prescribed by the law applicable to that kind of payment.

A claimant's acceptance of a settlement under this section fully satisfies the claim concerned. This section does not authorize the payment of any claim compensated by private law before October 25, 1951.

(d) Applicable current appropriations are available to continue the pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but for not longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment or reappointment, the Secretary concerned may reenlist a person in, or appoint or reappoint him to, the grade to which payments under this section relate.

(e) No payment may be made under this section for a benefit to which the claimant might later become entitled under the laws and regulations administered by the Secretary of Veterans Affairs.

(f) With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)), action under subsection (a) may extend only to–

(1) correction of a record to reflect actions taken by reviewing authorities under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)); or

(2) action on the sentence of a court-martial for purposes of clemency.

(g) In this section, the term "military record" means a document or other record that pertains to (1) an individual member or former member of the armed forces, or (2) at the discretion of the Secretary of the military department concerned, any other military matter affecting a member or former member of the armed forces, an employee or former employee of that military department, or a dependent or current or former spouse of any such person. Such term does not include records pertaining to civilian employment matters (such as matters covered by title 5 and chapters 81, 83, 87, 108, 373, 605, 607, 643, and 873 of this title).

28 U.S.C. § 2501

§ 2501. Time for filing suit

Every Claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

REGULATIONS

32 C.F.R. § 581.3

§ 581.3. Army Board for Correction of Military Records.

(a) General--

(1) Purpose. This section prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the Army Board for Correction of Military Records (ABCMR).

(2) Statutory authority. Title 10 U.S.C Section 1552, Correction of Military Records: Claims Incident Thereto, is the statutory authority for this regulation.

(b) Responsibilities.

(1) The Secretary of the Army. The Secretary of the Army will oversee the operations of the ABCMR. The Secretary will take final action on applications, as appropriate.

(2) The ABCMR Director. The ABCMR Director will manage the ABCMR's day-to-day operations.

(3) The chair of an ABCMR panel. The chair of a given ABCMR panel will preside over the panel, conduct a hearing, maintain order, ensure the

applicant receives a full and fair opportunity to be heard, and certify the written record of proceedings in pro forma and formal hearings as being true and correct.

(4) The ABCMR members. The ABCMR members will--

(i) Review all applications that are properly before them to determine the existence of error or injustice.

(ii) If persuaded that material error or injustice exists, and that sufficient evidence exists on the record, direct or recommend changes in military records to correct the error or injustice.

(iii) Recommend a hearing when appropriate in the interest of justice.

(iv) Deny applications when the alleged error or injustice is not adequately supported by the evidence, and when a hearing is not deemed proper.

(v) Deny applications when the application is not filed within prescribed time limits and when it is not in the interest of justice to excuse the failure to file in a timely manner.

(5) The director of an Army records holding agency. The director of an Army records holding agency will--

(i) Take appropriate action on routine issues that may be administratively corrected under authority inherent in the custodian of the records and that do not require ABCMR action.

(ii) Furnish all requested Army military records to the ABCMR.

(iii) Request additional information from the applicant, if needed, to assist the ABCMR in conducting a full and fair review of the matter.

(iv) Take corrective action directed by the ABCMR or the Secretary of the Army.

(v) Inform the Defense Finance and Accounting Service (DFAS), when appropriate; the applicant; applicant's counsel, if any; and interested Members of Congress, if any, after a correction is complete.

(vi) Return original records of the soldier or former soldier obtained from the Department of Veterans Affairs (VA).

(6) The commanders of Army Staff agencies and commands. The commanders of Army Staff agencies and commands will--

(i) Furnish advisory opinions on matters within their areas of expertise upon request of the ABCMR, in a timely manner.

(ii) Obtain additional information or documentation as needed before providing the opinions to the ABCMR.

(iii) Provide records, investigations, information, and documentation upon request of the ABCMR.

(iv) Provide additional assistance upon request of the ABCMR.

(v) Take corrective action directed by the ABCMR or the Secretary of the Army.

(7) The Director, Defense Finance and Accounting Service (DFAS). At the request of the ABCMR staff, the Director, DFAS, will--

(i)Furnish advisory opinions on matters within the DFAS area of expertise upon request.

(ii) Obtain additional information or documentation as needed before providing the opinions.

(iii) Provide financial records upon request.

(iv) On behalf of the Army, settle claims that are based on ABCMR final actions.

(v) Report quarterly to the ABCMR Director on the monies expended as a result of ABCMR action and the names of the payees.

(c) ABCMR establishment and functions.

(1) ABCMR establishment. The ABCMR operates pursuant to law (10 U.S.C. 1552) within the Office of the Secretary of the Army. The ABCMR consists of civilians regularly employed in the executive part of the Department of the Army (DA) who are appointed by the Secretary of the Army and serve on the ABCMR as an additional duty. Three members constitute a quorum.

(2) ABCMR functions.

(i) The ABCMR considers individual applications that are properly brought before it. In appropriate cases, it directs or recommends correction of military records to remove an error or injustice.

(ii) When an applicant has suffered reprisal under the Military Whistleblower Protection Act, 10 U.S.C. 1034 and Department of Defense Directive (DODD) 7050.6, the ABCMR may recommend to the Secretary of the Army that disciplinary or administrative action be taken against any Army official who committed an act of reprisal against the applicant.

(iii) The ABCMR will decide cases on the evidence of record. It is not an investigative body. The ABCMR may, in its discretion, hold a hearing (sometimes referred to as an evidentiary hearing or an administrative hearing in 10 U.S.C. 1034 and DODD 7050.6) or request additional evidence or opinions.

(d) Application procedures--

(1) Who may apply.

(i) The ABCMR's jurisdiction under 10 U.S.C. 1552 extends to any military record of the DA. It is the nature of the record and the status of the applicant that define the ABCMR's jurisdiction.

(ii) Usually applicants are soldiers or former soldiers of the Active Army, the U.S. Army Reserve (USAR), and in certain cases, the Army National Guard of the United States (ARNGUS) and other military and civilian individuals affected by an Army military record. Requests are personal to the applicant and relate to military records. Requests are submitted on DD Form 149 (Application for Correction of Military Record under the Provisions of 10 U.S.C. 1552). Soldiers need not submit applications through their chain of command.

(iii) An applicant with a proper interest may request correction of another person's military records when that person is incapable of acting on his or her own behalf, missing, or deceased. Depending on the circumstances, a child, spouse, parent or other close relative, heir, or legal

representative (such as a guardian or executor) of the soldier or former soldier may be able to demonstrate a proper interest. Applicants must send proof of proper interest with the application when requesting correction of another person's military records.

(2) Time limits. Applicants must file an application within 3 years after an alleged error or injustice is discovered or reasonably should have been discovered. The ABCMR may deny an untimely application. The ABCMR may excuse untimely filing in the interest of justice.

(3) Administrative remedies. The ABCMR will not consider an application until the applicant has exhausted all administrative remedies to correct the alleged error or injustice.

(4) Stay of other proceedings. Applying to the ABCMR does not stay other proceedings.

(5) Counsel.

(i) Applicants may be represented by counsel, at their own expense.

(ii) See DODD 7050.6 for provisions for counsel in cases processed under 10 U.S.C. 1034.

(e) Actions by the ABCMR Director and staff.

(1) Criteria. The ABCMR staff will review each application to determine if it meets the criteria for consideration by the ABCMR. The application may be returned without action if--

(i) The applicant fails to complete and sign the application.

(ii) The applicant has not exhausted all other administrative remedies.

(iii) The ABCMR does not have jurisdiction to grant the requested relief.

(iv) No new evidence was submitted with a request for reconsideration.

(2) Burden of proof. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

(3) ABCMR consideration.

(i) A panel consisting of at least three ABCMR members will consider each application that is properly brought before it. One panel member will serve as the chair.

(ii) The panel members may consider a case on the merits in executive session or may authorize a hearing.

(iii) Each application will be reviewed to determine--

(A) Whether the preponderance of the evidence shows that an error or injustice exists and--

(1) If so, what relief is appropriate.

(2) If not, deny relief.

(B) Whether to authorize a hearing.

(C) If the application is filed outside the statute of limitations and whether to deny based on untimeliness or to waive the statute in the interest of justice.

(f) Hearings. ABCMR hearings. Applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

(g) Disposition of applications.

(1) ABCMR decisions. The panel members' majority vote constitutes the action of the ABCMR. The ABCMR's findings, recommendations, and in the case of a denial, the rationale will be in writing.

(2) ABCMR final action.

(i) Except as otherwise provided, the ABCMR acts for the Secretary of the Army, and an ABCMR decision is final when it--

(A) Denies any application (except for actions based on reprisals investigated under 10 U.S.C. 1034).

(B) Grants any application in whole or in part without a hearing when--

(1) The relief is as recommended by the proper staff agency in an advisory opinion; and

(2) Is unanimously agreed to by the ABCMR panel; and

(3) Does not involve an appointment or promotion requiring confirmation by the Senate.

(ii) The ABCMR will forward the decisional document to the Secretary of the Army for final decision in any case in which--

(A) A hearing was held.

(B) The facts involve reprisals under the Military Whistleblower Protection Act, confirmed by the DOD Inspector General (DODIG) under 10 U.S.C. 1034 and DODD 7050.6.

(C) The ABCMR recommends relief but is not authorized to act for the Secretary of the Army on the application.

(3) Decision of the Secretary of the Army.

(i) The Secretary of the Army may direct such action as he or she deems proper on each case. Cases returned to the Board for further consideration will be accompanied by a brief statement of the reasons for such action. If the Secretary does not accept the ABCMR's recommendation, adopts a minority position, or fashions an action that he or she deems proper and supported by the record, that decision will be in writing and will include a brief statement of the grounds for denial or revision.

(ii) The Secretary of the Army will issue decisions on cases covered by the Military Whistleblower Protection Act (10 U.S.C. 1034 and DODD 7050.6). In cases where the DODIG concluded that there was reprisal, these decisions will be made within 180 days after receipt of the application and the investigative report by the DODIG, the Department of the Army Inspector General (DAIG), or other Inspector General offices. Unless the full relief requested is granted, these applicants will be informed of their right to request review of the decision by the Secretary of Defense.

(4) Reconsideration of ABCMR decision. An applicant may request the ABCMR to reconsider a Board decision under the following circumstances:

(i) If the ABCMR receives the request within 1 year of the ABCMR's action and if the ABCMR has not previously reconsidered the matter, the ABCMR staff will review the request to determine if it contains evidence (including, but not limited to, any facts or arguments as to why relief should be granted) that was not in the record at the time of the ABCMR's prior consideration. If new evidence has been submitted, the request will be submitted to the ABCMR for its determination of whether the new evidence is sufficient to demonstrate material error or injustice. If no new evidence is found, the ABCMR staff will return the application to the applicant without action.

(ii) If the ABCMR receives the request more than 1 year after the ABCMR's action or after the ABCMR has already considered one request for reconsideration, the ABCMR staff will review the request to determine if substantial relevant evidence is submitted showing fraud, mistake of law, mathematical miscalculation, manifest error, or the existence of substantial relevant new evidence discovered contemporaneously or within a short time after the ABCMR's original consideration. If the ABCMR staff finds such evidence, it will be submitted to the ABCMR for its determination of whether a material error or injustice exists and the proper remedy. If the ABCMR staff does not find such evidence, the application will be returned to the applicant without action.

(h) Claims/Expenses.--

(1) Authority.

(i) The Army, by law, may pay claims for amounts due to applicants as a result of correction of military records.

(ii) The Army may not pay any claim previously compensated by Congress through enactment of a private law.

(iii) The Army may not pay for any benefit to which the applicant might later become entitled under the laws and regulations managed by the VA.

(2) Settlement of claims.

(i) The ABCMR will furnish DFAS copies of decisions potentially affecting monetary entitlement or benefits. The DFAS will treat such decisions as claims for payment by or on behalf of the applicant.

(ii) The DFAS will settle claims on the basis of the corrected military record. The DFAS will compute the amount due, if any. The DFAS may require applicants to furnish additional information to establish their status as proper parties to the claim and to aid in deciding amounts due. Earnings received from civilian employment during any period for which active duty pay and allowances are payable will be deducted. The applicant's acceptance of a settlement fully satisfies the claim concerned.

(3) Payment of expenses. The Army may not pay attorney's fees or other expenses incurred by or on behalf of an applicant in connection with an application for correction of military records under 10 U.S.C. 1552.

* * *

Supreme Court, U.S.
FILED
JAN 2 - 2004
OFFICE OF THE CLERK

No. 03-418

In the Supreme Court of the United States

GABRIEL J. MARTINEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Under 28 U.S.C. 2501, civil actions filed in the Court of Federal Claims must be commenced "within six years after such claim first accrues." The question presented is whether a former service member's claims in a lawsuit challenging administrative actions by the Army that led to the forfeiture of two months' pay and then to his involuntary separation from active duty first accrued when the pay was forfeited and he was separated from active duty or when the Army Board for Correction of Military Records rejected his application for review of the administrative actions.

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In the Supreme Court of the United States

No. 03-418

GABRIEL J. MARTINEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A71) is reported at 333 F.3d 1295. The opinion of the United States Court of Federal Claims (Pet. App. B1-B15) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 2003. The petition for a writ of certiorari was filed on September 15, 2003. The jurisdiction of this Court is mistakenly invoked under 28 U.S.C. 1259(3). The applicable jurisdictional provision is 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was commissioned as a reserve officer in the United States Army in 1979 and entered active duty in 1980. Pet. App. B1-B2. In March 1991, he was issued a letter of reprimand for failing to follow proper procedures concerning leave. *Id.* at B2-B3. Later in 1991, after a proceeding under Article 15 of the Uniform Code of Military Justice, 10 U.S.C. 815, petitioner was ordered to forfeit two months' pay for fraternizing with an enlisted woman, engaging in a sexual relationship with her, and related offenses. Pet. App. B3-B5. In February 1992, petitioner was removed from active duty as a result of his misconduct. *Id.* at B5-B6. At the time of his release, petitioner had attained the rank of captain. *Id.* at B5.

In April 1994, a board of officers convened to consider whether petitioner should be removed from the Army Reserve. Pet. App. B6. It concluded that petitioner had not committed the offenses he was found to have committed at the Article 15 proceeding and recommended that he remain in the Reserve. *Ibid.* In May 1994, petitioner was notified that he had not been selected for promotion to the rank of major. *Ibid.*

In March 1995, petitioner made an application to the Army Board for Correction of Military Records (Correction Board or Board) pursuant to 10 U.S.C. 1552. Pet. App. B7. He sought retroactive reinstatement to active duty, promotion to major, back pay, return of his forfeited pay, and expungement of the letter of reprimand and the Article 15 proceeding. *Ibid.* In August 1995, the Correction Board denied petitioner's request, finding that his removal from active duty was proper. *Id.* at B7-B8. On March 25, 1997, petitioner was separated from the Army Reserve after having been passed

over a second time for promotion to major. *Id.* at B9. The next day, the Correction Board denied petitioner's request for reconsideration of his application. *Ibid.*

2. On August 17, 1998, petitioner filed suit in the Court of Federal Claims. Pet. App. B9. Alleging that the Correction Board's decision was arbitrary, capricious, and unsupported by substantial evidence, petitioner sought retroactive reinstatement to active duty, back pay, return of the pay forfeited as a result of the Article 15 proceeding, and correction of his records. *Ibid.*

The court dismissed the suit as untimely. Pet. App. B1-B15. Relying on 28 U.S.C. 2501, which requires that a claim in the Court of Federal Claims be filed "within six years after such claim first accrues," and on the Federal Circuit's decision in *Hurick* v. *Lehman*, 782 F.2d 984 (1986), which interpreted the analogous provision for suits against the United States in district court, 28 U.S.C. 2401(a), the court held that petitioner's claim for the return of the forfeited pay accrued in 1991, when the pay was forfeited, and that his claim for active-duty back pay accrued in 1992, when he was separated from active duty. Pet. App. B11-B12. The court rejected petitioner's argument that his claims did not accrue until 1995, when the Correction Board refused to correct his records. *Id.* at B10, B13. The court stated that *Hurick* had "squarely rejected" that argument in holding that resort to a correction board is optional and does not give rise to a "separate and independent claim." *Id.* at B13 (quoting *Hurick*, 782 F.2d at 987).

3. Petitioner appealed to the Federal Circuit. Pet. App. A8. The court granted en banc review and invited the parties to address the question whether *Hurick* should be overruled. *Ibid.* A divided en banc court de-

clined to do so and affirmed the Court of Federal Claims' dismissal of petitioner's complaint. *Id.* at A1-A71.

a. In a section of its opinion joined by 10 of the 13 judges who heard the case (Pet. App. A2), the court first held that petitioner's claim for recovery of the monetary losses he suffered as a result of his discharge from active duty accrued on the date of the discharge. *Id.* at A10-A28. Applying the established principle that a cause of action under the Tucker Act, 28 U.S.C. 1491(a)(1), "accrues as soon as all events have occurred that are necessary to enable the plaintiff to bring suit" (Pet. App. A12), the court noted that it had long held in military-discharge cases that a former service member's claim for back pay accrues on the date of the discharge and is barred if suit is not brought within six years of that date. *Id.* at A12-A13. The court rejected petitioner's argument that his claims did not accrue until the Correction Board's decision. *Id.* at A13-A28. Citing, among other decisions, *Soriano* v. *United States*, 352 U.S. 270 (1957), the court concluded that resort to the Correction Board is not a prerequisite to bringing a Tucker Act suit, and thus that the running of the limitations period is not tolled while a claim is pending before the Board. Pet. App. A13-A28.

In a section of its opinion joined by seven judges (Pet. App. A2), the court of appeals next held that the Correction Board's decision did not give rise to a separate cause of action with a new limitations period. *Id.* at A29-A39. Relying on longstanding precedent, including *Hurick* (*id.* at A30-A32), the court explained that the correction-board statute, 10 U.S.C. 1552, does not "creat[e] a new and independent cause of action" for back pay, but simply "provide[s] for further review of a ruling on a cause of action." Pet. App. A31 (quoting

Friedman v. *United States*, 310 F.2d 381, 397 (Ct. Cl. 1962), cert. denied, 373 U.S. 932 (1963)). Even though Section 1552 "mandates the payment of money if the correction board concludes that the service member's discharge was unlawful," the court said, Section 1552 "is not the 'money-mandating' statute that gives rise to the cause of action." *Id.* at A38. Instead, the basis for a military back-pay suit comes from "a different statute, such as the Military Pay Act, 37 U.S.C. § 204." *Id.* at A38. Rejecting petitioner's contention that *Hurick* "is contrary to the decisions of several other courts of appeals" (*id.* at A33), the court explained that those cases were challenges under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, that sought equitable relief, not Tucker Act suits for money. Pet. App. A33-A36.

In the final two sections of its opinion, each of which was joined by 10 judges (Pet. App. A2), the court rejected petitioner's argument that the statute of limitations should be tolled (*id.* at A39-A48) and rejected his argument that the non-monetary portion of the case should be transferred to a district court (*id.* at A48-A50).

b. Judge Plager filed a dissenting opinion that was joined by five other judges. Pet. App. A51-A71. In his view, the statute (10 U.S.C. 1552) and the regulation (32 C.F.R. 581.3) that govern the Correction Board are "money-mandating" provisions creating a separate cause of action that is enforceable under the Tucker Act and accrues at the time of the Correction Board's decision. Pet. App. A57-A64.

ARGUMENT

Petitioner contends (Pet. 3-9) that the court of appeals erred in holding that the limitations period of 28 U.S.C. 2501 ran from the date of the underlying actions taken by the military rather than the date of the Correction Board's rejection of petitioner's challenge to those actions. Further review is not warranted. The decision of the court of appeals is correct; it does not conflict with the decision of any other court of appeals; and its significance is diminished by the recent enactment of a law that requires, in certain circumstances, the exhaustion of a correction-board remedy before a service member may seek judicial review. The claim raised by petitioner has been consistently rejected by the Federal Circuit and its predecessor over the last four decades (see Pet. App. A12-A14, A30-A32), and this Court has repeatedly denied review.[1] There is no reason for a different result here.

1. a. The court of appeals correctly held (Pet. App. A10-A28) that exhaustion of the Correction Board remedy is optional; that the limitations period for petitioner's claim for recovery of the monetary losses he suffered as a result of his discharge from active duty therefore ran from the date of the discharge; and that the limitations period was not tolled pending the exhaustion of the administrative remedy. That ruling is consistent with this Court's decision in *Soriano* v. *United States*, 352 U.S. 270 (1957), which holds that the limitations period of Section 2501 begins to run when

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[1] See, *e.g.*, *Pacyna* v. *Marsh*, 617 F. Supp. 101 (W.D.N.Y. 1984), aff'd, 809 F.2d 792 (Fed. Cir. 1986) (Table), cert. denied, 481 U.S. 1048 (1987); *Bonen* v. *United States*, 666 F.2d 536 (Ct. Cl. 1981), cert. denied, 456 U.S. 991 (1982); *Friedman* v. *United States*, 310 F.2d 381, 396-403 (Ct. Cl. 1962), cert. denied, 373 U.S. 932 (1963).

suit can first be brought, not when an optional administrative remedy has been exhausted. *Id.* at 273-275.

Petitioner contends (Pet. 4-6) that the Correction Board's decision creates a separate cause of action, for which the six-year limitations period begins anew. The court of appeals' contrary holding (Pet. App. A29-A39) is correct. As the court explained, the problem with this "second cause of action" theory is that, in order for petitioner's claim to be within the Tucker Act jurisdiction of the Court of Federal Claims, "it had to be for money owing to him," and the only money that he claims is owing to him is "the back pay withheld from the date of his separation from active duty in February 1992" and "the forfeiture of pay pursuant to his Article 15 punishment in 1991." *Id.* at A29. If petitioner is entitled to that money, his right to it "accrued in 1991 and 1992," when "he was deprived of the money." *Ibid.* The Board's decision years later "did not cause [petitioner] monetary injury, but merely failed to remedy the injury he had previously suffered." *Id.* at A35. While the Correction Board statute is a "money-mandating" statute in the sense that it requires the government to grant monetary relief to a service member if the Board determines that the service member's record should be corrected in a way that creates an entitlement to back pay, see 10 U.S.C. 1552(c),[2] it is not Section 1552, but some other statute, such as the Military Pay Act, 37 U.S.C. 204, that is the source of the right to back pay. Pet. App. A37-A38.

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[2] Section 1552(c) provides that the Secretary of a military department "may pay, from applicable current appropriations, a claim for the loss of pay * * * or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant."

b. The other grounds on which petitioner challenges the court of appeals' decision are equally without merit. First, petitioner contends (Pet. 7) that the court's decision is inconsistent with the presumption in favor of judicial review of a final agency decision. The court correctly rejected the suggestion that "the existence of judicial review" requires the conclusion that "the limitations period runs from the time of the Correction Board's decision." Pet. App. A31 (quoting *Friedman*, 310 F.2d at 397). As the court explained, "[a]ll that the existence of judicial review means is that the Board's decision will be reviewed, in a proper case, if a timely suit is brought." *Ibid.* (quoting *Friedman*, 310 F.2d at 397).

Second, petitioner contends that there are "prudential and practical reasons for requiring exhaustion of available administrative remedies," and that the court of appeals' decision "undermines the importance and utility of exhaustion." Pet. 7. The court correctly rejected that contention as well. Pet. App. A16-A28. As an initial matter, whether exhaustion is required in any particular context is, as the court noted, a matter of "congressional intent." *Id.* at A16 (citing *Sims* v. *Apfel*, 530 U.S. 103, 107 (2000), *Darby* v. *Cisneros*, 509 U.S. 137, 144-145 (1993), and *Patsy* v. *Board of Regents*, 457 U.S. 496, 501 (1982)). And the "historical evidence" (*id.* at A19) reviewed by the court (*id.* at A19-A22) supports its "consistent interpretation of the correction board legislation as creating a permissive avenue for collateral administrative relief, not a mandatory prerequisite to suit" (*id.* at A19). That historical evidence includes contemporaneous Tucker Act cases holding that exhaustion of administrative remedies was not required and the absence of any suggestion that a correction-board remedy was intended to be mandatory rather

than permissive. *Id.* at A21. In any event, while, as the court acknowledged, "there are often benefits to be obtained from pre-suit exhaustion of administrative remedies" (*id.* at A24), the court identified (*id.* at A25-A28) a number of "significant competing policy reasons that counsel against imposing a rigid exhaustion requirement" (*id.* at A25). Those considerations include the fact that many service members might prefer to have the option of seeking an immediate judicial remedy and the fact that extending the period within which a claim can be brought could make it more difficult to prove the claim, by increasing the risk of lost evidence, unavailable witnesses, and faded memories. *Id.* at A25-A26.

Third, petitioner contends that the court of appeals' approach "forecloses judicial review to an entire class of former military member[s] who first use[] the available * * * administrative remedy prior to instituting litigation." Pet. 8. Petitioner is not well-positioned to make that claim, because there were two and a half years remaining in the six-year limitations period when the Correction Board denied him relief. Pet. App. A27. In any event, a service member who is truly confronted with an approaching deadline can file suit in the Court of Federal Claims and move to stay the suit pending completion of the Board proceeding. *Id.* at A26-A27.

2. Contrary to petitioner's contention (Pet. 6), the decision below does not conflict with decisions of other courts of appeals holding that a correction-board decision was reviewable under the APA even though the limitations period for the underlying decision—in those cases, a discharge—had expired. The court of appeals correctly concluded (Pet. App. A33-A36) that those decisions are distinguishable, because they did not involve a claim for money damages under the Tucker

Act. The plaintiffs in those APA cases sought relief "other than money damages" (5 U.S.C. 702) and claimed to have been "adversely affected or aggrieved" (*ibid.*) by "final agency action" (5 U.S.C. 704). The challenged action was therefore the board's refusal to change the plaintiff's discharge status rather than the discharge itself. As the court of appeals observed, this distinction was recognized by "the very cases on which [petitioner] relies." Pet. App. A34.[3]

3. Review by this Court is particularly unwarranted in view of the passage of the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012. Section 503 of that law (115 Stat. 1080-1085) added 10 U.S.C. 1558, which requires certain military claimants to exhaust an administrative remedy before filing suit. Section 1558(f)(1) provides that a person seeking to challenge an action or recommendation of a "selection board," or an action taken by the Secretary of a military department based on the report of a "selection board," is not entitled to relief in a judicial proceeding unless the action or recommendation has first been considered by a "special board" or the Secretary has denied the convening of a "special board" for such consideration. The term "selection board" encompasses a variety of military boards convened to make recommendations concerning appointment, promotion, separation, retirement, transfer, and other personnel actions. 10 U.S.C. 1558(b)(2)(A). The term "special board" has a similar definition (10 U.S.C.

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[3] See *Blassingame* v. *Secretary of Navy*, 811 F.2d 65, 72 (2d Cir. 1987); *Smith* v. *Marsh*, 787 F.2d 510, 511-512 (10th Cir. 1986); *Dougherty* v. *United States Navy Bd. for Corr. of Naval Records*, 784 F.2d 499, 501-502 & n.10 (3d Cir. 1986); *Geyen* v. *Marsh*, 775 F.2d 1303, 1308-1309 (5th Cir. 1985).

1558(b)(1)(A)), and includes a board for the correction of military records if it is designated a "special board" by the Secretary (10 U.S.C. 1558(b)(1)(B)).

Section 1558 does not apply to petitioner's action, because it was commenced before the Act's effective date. See 10 U.S.C. 1558 note. There may be future actions like petitioner's, moreover, that are not subject to Section 1558, because it does not require exhaustion of a correction-board remedy in all circumstances. Nevertheless, by requiring exhaustion of such a remedy prior to suit in some cases, the new statute diminishes the significance of the court of appeals' decision. As the court recognized (Pet. App. A14, A19), where exhaustion of an administrative remedy is mandatory, a plaintiff's claim ordinarily does not accrue until the conclusion of the administrative proceeding. See *Crown Coat Front Co.* v. *United States*, 386 U.S. 503 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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